IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. ~~75-~~ 1303

QANTAS AIRWAYS LIMITED,

Petitioner,

—v.—

FOREMOST INTERNATIONAL TOURS, INC.,

Respondent.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 408, 49 U.S.C. § 1378

Consolidation, merger, and acquisition of control—Prohibited acts

(a) It shall be unlawful unless approved by order of the Board as provided in this section—

(1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;

(2) For any air carrier, any person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any air carrier;

(3) For any air carrier or person controlling an air carrier to purchase, lease, or contract to operate the properties, or any substantial part thereof, of any person engaged in any phase of aeronautics otherwise than as an air carrier;

(4) For any foreign air carrier or person controlling a foreign air carrier to acquire control, in any manner whatsoever, of any citizen of the United States engaged in any phase of aeronautics;

(5) For any air carrier or person controlling an air carrier, any other common carrier, any person en-

gaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever: *Provided,* That the Board may by order exempt any such acquisition of a noncertificated air carrier from this requirement to the extent and for such periods as may be in the public interest;

(6) For any air carrier or person controlling an air carrier to acquire control, in any manner whatsoever, of any person engaged in any phase of aeronautics otherwise than as an air carrier; or

(7) For any person to continue to maintain any relationship established in violation of any of the foregoing subdivisions of this subsection.

Application to Board; hearing; approval; disposal without hearing

(b) Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control: *Provided further,* That if the applicant is a carrier other than an air carrier, or a person controlled by a carrier other than an air carrier or affiliated therewith within the meaning of section 5(8) of this title, such applicant shall for the purposes of this section be considered an air carrier and the Board shall not enter such an order of approval unless it finds that the transaction proposed will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition: *Provided further,* That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

Interests in Ground Facilities

(c) The provisions of this section and section 1379 of this title shall not apply with respect to the acquisition or holding by any air carrier, or any officer or director thereof, of (1) any interest in any ticket office, landing area, hangar, or other ground facility reasonably incidental to the performance by such air carrier of any of its services, or (2) any stock or other interest or any office or directorship in any person whose principal business is the maintenance or operation of any such ticket office, landing area, hangar, or other ground facility.

Jurisdiction of Accounts of Noncarriers

(d) Whenever, after the effective date of this section, a person, not an air carrier, is authorized, pursuant to this section, to acquire control of an air carrier, such person thereafter shall, to the extent found by the Board to be reasonably necessary for the administration of this chapter, be subject, in the same manner as if such person were an air carrier, to the provisions of this chapter relating to accounts, records, and reports, and the inspection of facilities and records, including the penalties applicable in the case of violations thereof.

Investigation of Violations

(e) The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions

of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision. Pub. L. 85-726, Title IV, § 408, Aug. 23, 1958, 72 Stat. 767; Pub.L 86-758, § 1, Sept. 13, 1960, 74 Stat. 901.

Presumption of Control; Beneficial Ownership

(f) For the purposes of this section, any person owning beneficially 10 per centum or more of the voting securities or capital, as the case may be, of an air carrier shall be presumed to be in control of such air carrier unless the Board finds otherwise. As used herein, beneficial ownership of 10 per centum of the voting securities of a carrier means ownership of such amount of its outstanding voting securities as entitled the holder thereof to cast 10 per centum of the aggregate votes which the holders of all the outstanding voting securities of such carrier are entitled to cast. As amended Pub.L. 91-62, § 1(2), (3) (A), Aug. 20, 1969, 83 Stat. 103, 104.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 409, 49 U.S.C. § 1379

Prohibited interests; interlocking relationships; profit from transfer of securities

(a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or

who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(b) It shall be unlawful for any officer or director of any air carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof. Pub.L. 85-726, Title IV, § 409, Aug. 23, 1958, 72 Stat. 768.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 411, 49 U.S.C. § 1381

Methods of competition

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. Pub.L. 85-726, Title IV, § 411, Aug. 23, 1958, 72 Stat. 769.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 412, 49 U.S.C. § 1382

Pooling and other agreements; filing, approved by Board

(a) Every air carrier shall file with the Board a true copy, or, if oral, a true and complete memorandum, of every contract or agreement (whether enforceable by provisions for liquidated damages, penalties, bonds, or otherwise) affecting air transportation and in force on the effective date of this section or hereafter entered into, or any modification or cancellation thereof, between such air carrier and any other air carrier, foreign air carrier, or other carrier for pooling or apportioning earnings, losses, traffic, service, or equipment, or relating to the establishment of transportation rates, fares, charges, or classifications, or for preserving and improving safety, economy, and efficiency of operation, or for controlling, regulating, preventing, or otherwise eliminating destructive, oppressive, or wasteful competition, or for regulating stops, schedules, and character of service, or for other cooperative working arrangements.

(b) The Board shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this chapter, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this chapter; except that the Board may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier

subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it. Pub. L. 85-726, Title IV, § 412, Aug. 23, 1958, 72 Stat. 770.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 414, 49 U.S.C. § 1384

Legal restraints

Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order. Pub. L. 85-726, Title IV, § 414, Aug. 23, 1958, 72 Stat. 770.

Federal Aviation Act 1958, as amended, 49 U.S.C. § 1301 *et seq.*

§ 1002(j), 49 U.S.C. § 1482(j)

Complaints to and investigations by the Administrator and the Board

(j) (1) Whenever any air carrier or foreign air carrier shall file with the Board a tariff stating a new individual or joint (between air carriers, between foreign air carriers, or between an air carrier or carriers and a foreign air carrier or carriers) rate, fare, or charge for foreign air transportation or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once, and, if it so orders, without answer or other formal pleading by the air carrier or foreign air carrier, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hearing and the decision thereon, the Board, by filing with such tariff, and delivering to the air carrier or foreign air carrier affected thereby, a statement in writing of its reasons for such suspension, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, for a period or periods not exceeding three hundred and sixty-five days in the aggregate beyond the time when such tariff would otherwise go into effect. If, after hearing, the Board shall be of the opinion that such rate, fare, or charge, or such classification, rule, regulation, or practice, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may take action to reject or cancel such tariff and prevent the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. The Board may at any time rescind the suspension of such tariff and permit the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. If the proceeding has not been concluded and an order made within the period of suspension or suspensions, or if the Board shall otherwise so direct, the proposed rate, fare, charge, classification, rule, regulation, or practice shall go into effect subject, however, to being canceled when the proceeding is concluded. This paragraph shall not apply to any initial tariff filed by an air carrier or foreign air carrier. During the period of any suspension or suspensions, or following rejection or cancellation of a tariff, including tariffs which have gone into effect provisionally, the affected air carrier or foreign air carrier shall maintain in effect and use the rate, fare, or charge, or the classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of service thereunder, which was in effect immediately prior to the filing of the new tariff.

(2) With respect to any existing tariff of an air carrier or foreign air carrier stating rates, fares, or charges for foreign air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, the Board is empowered, upon complaint or upon its own initiative, at once and, if it so orders, without answer or other formal pleading by the air carrier or foreign air carrier, but upon reasonable notice, to enter into a hearing concerning the lawfulness of such rate, fare, or charge, or such classification, rule, regulation, or practice; and pending such hear-

ing and the decision thereon, the Board, upon reasonable notice, and by filing with such tariff, and delivering to the air carrier or foreign air carrier affected thereby, a statement in writing of its reasons for such suspension, and the effective date thereof, may suspend the operation of such tariff and defer the use of such rate, fare, or charge, or such classification, rule, regulation, or practice, following the effective date of such suspension, for a period or periods not exceeding three hundred and sixty-five days in the aggregate from the effective date of such suspension. If, after hearing, the Board shall be of the opinion that such rate, fare, or charge, or such classification, rule, regulation, or practice, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Board may take action to cancel such tariff and prevent the use of such rate, fare, or charge, or such classification, rule, regulation, or practice. If the proceeding has not been concluded within the period of suspension or suspensions, the tariff shall again go into effect subject, however, to being canceled when the proceeding is concluded. For the purposes of operation during the period of such suspension, or the period following cancellation of an existing tariff pending effectiveness of a new tariff, the air carrier or foreign air carrier may file a tariff embodying any rate, fare, or charge, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, that may be currently in effect (and not subject to a suspension order) for any air carrier engaged in the same foreign air transportation.

(3) Whenever the Board finds that the government or aeronautical authorities of any foreign country have refused to permit the charging of rates, fares, or charges contained in a properly filed and published tariff of an air carrier filed under this chapter for foreign air transportation to such foreign country, the Board may, without hearing, (A) suspend the operation of any existing tariff of any foreign air carrier providing services between the United States and such foreign country for a period or periods not exceeding three hundred and sixty-five days in the aggregate from the date of such suspension, and (B) during the period of such suspension or suspensions, order the foreign air carrier to charge rate, fares, or charges which are the same as those contained in a properly filed and published tariff (designated by the Board) of an air carrier filed under this chapter for foreign air transportation to such foreign country, and the effective right of an air carrier to start or continue service at the designated rates, fares, or charges to such foreign country shall be a condition to the continuation of service by the foreign air carrier in foreign air transportation to such foreign country.

(4) The provisions of this subsection and compliance with any order of the Board issued pursuant thereto shall be an express condition to the certificates or permits now held or hereafter issued to any air carrier or foreign air carrier, and the maintenance of rates, fares, or charges in conformity with the requirements of such provisions and such order of the Board shall be a condition to the continuation of the affected service by such air carrier or foreign air carrier.

(5) In exercising and performing its powers and duties under this subsection with respect to the rejection or cancellation of rates for the carriage of persons or property,

the Board shall take into consideration, among other factors—

(A) the effect of such rates upon the movement of traffic;

(B) the need in the public interest of adequate and efficient transportation of persons and property by air carriers and foreign air carriers at the lowest cost consistent with the furnishing of such service;

(C) such standards respecting the character and quality of service to be rendered by air carriers and foreign air carriers as may be prescribed by or pursuant to law;

(D) the inherent advantages of transportation by aircraft;

(E) the need of such air carrier and foreign air carrier for revenue sufficient to enable such air carrier and foreign air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier and foreign air carrier service; and

(F) whether such rates will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation.

As amended Pub.L. 92-259, § 3(a), Mar. 22, 1972, 86 Stat 96.

The Clayton Act, 15 U.S.C. § 12 *et seq.*

§ 16, 15 U.S.C. § 26

Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission.

Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

The Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 74-2463

FOREMOST INTERNATIONAL TOURS, INC.,

Plaintiff-Appellee,

vs.

QANTAS AIRWAYS LIMITED, DOE ONE through DOE TEN, Inclusive,

Defendants-Appellants.

[October 22, 1975]

On Appeal from the United States District Court for the District of Hawaii

Before:

BARNES, KILKENNY and GOODWIN,

Circuit Judges.

BARNES, *Senior Circuit Judge:*

Plaintiff-Appellee Foremost International Tours, Inc., is a wholesaler of tour programs. Its business consists of arranging for and putting together the necessary elements of land and air transportation, hotel accommodations, car rentals, sightseeing excursions, and so forth, to create a fully inclusive tour package, and then in operating, over-

seeing and selling these tours. Foremost markets its tour programs through retail outlets including travel agents and the ticket offices of those airlines which sponsor or participate in providing the air transportation phase of the tour in question.

Defendant-Appellant Qantas is a foreign air carrier, which up until March 31, 1974, was a participating airline in one of Foremost's tours. On November 7, 1973, Qantas informed Foremost that it would not renew its annual contract (expiring March 31, 1974) with Foremost to provide air transportation for Foremost's "Royal Road Tours"; and on April 1, 1974, Qantas extended its operations and itself entered the business of producing and selling an integrated tour package in competition with Foremost.

Foremost subsequently brought this antitrust action against Qantas alleging violations of sections 1 and 2 of the Sherman Act, and complaining that the conduct of Qantas surrounding its entrance into the inclusive tour industry showed a clear intent to monopolize the inclusive tour industry, and was undertaken with predatory intent, and with the purpose of eliminating Foremost as a competitor in the market. (C.T. 11-12).

The District Court found that Foremost was faced with being irreparably injured (its very existence was endangered—see, finding 18, C.T. 492), and that the actions taken by Qantas in its vertical-conglomerate expansion into the tour business established a *prima facie* violation of the antitrust laws (379 F. Supp. 88, 97, D. Haw. 1974). Consequently, the District Court issued a preliminary injunction against Qantas enjoining it from engaging in certain proscribed conduct in its operation of competing integrated

tours. However, since many issues involved in the case[1] are matters affecting the air transportation industry regulated by the Civil Aeronautics Board (hereinafter CAB) the district judge, while retaining jurisdiction, stayed further proceedings in the District Court until the CAB could consider those matters which were in its primary jurisdiction.

Qantas appeals from the issuance of the preliminary injunction. We summarize the issues appellant raises as follows: (1) whether it was appropriate for the District Court to issue a preliminary injunction when: (a) the subject matter was arguably within the primary jurisdiction of the CAB; (b) the CAB arguably could have provided under the suspension power of 49 U.S.C. § 1482(j)(2) the prophylactic relief sought by Foremost, and (c) the provisions of § 414 of the Federal Aviation Act, 49 U.S.C. § 1384 (granting a limited antitrust immunity to various acts approved by the CAB); and (2) regardless of the outcome of the first issue, whether the requirements for the issuance of the preliminary injunction were met in this case at all.

This court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

We affirm.

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[1] As examples of such issues the District Court listed: "whether an airline such as Qantas may conduct an in-house tour operation, whether the acts of Qantas alleged in the complaint constitute unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof and whether the acts of Qantas alleged in the complaint have anticompetitive effects."

Another example of this sort of issue would be whether by means of improper accounting methods relating to fixed cost allocation and translation of foreign exchange rates. Quantas was violating its tariff and illegally subsidizing its land tour operations with air fare revenues.

Were this an antitrust case where the anticompetitive effects of the complained of action were *confined* to, and primarily affected, the regulated industry, *and* the regulatory agency had the power and authority to protect the status quo, should it deem it necessary, by issuing a cease and desist order, we would then agree with appellant that in issuing a preliminary injunction the District Court would be acting contrary to the intent of Congress when it established regulatory agencies to provide pervasive, coordinated, and uniform administration of an industry. These are the basic principles enunciated by the Supreme Court in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1962). But this is *not* such a case.

The instant case is not the normal type of case where the District Court's jurisdiction and the regulatory jurisdiction of an administrative agency conflict. In the usual case, we face one of two situations: (1) where one firm in a regulated industry is suing another firm in the same regulated industry over some intra-industry squabble relating to unfair competition, violation of some regulatory rule, territory allocation, horizontal agreements, or some other wholly intra-industry problem within the jurisdiction of the regulatory agency,[2] or (2) when the consumers of the regulated industry's product or service are objecting to the effects upon the quality, availability, or cost of the goods or service due to intra-industry combinations (*i.e.*, price

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[2] *See, e.g., Allied Air Freight* v. *Pan Am. World Airways, Inc.*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968); *S.S.W., Inc.* v. *Air Transport Ass'n of Am.*, 191 F.2d 658 (D.C. Cir. 1951); *Trans-Pacific Airlines, Ltd.* v. *Hawaiian Airlines, Ltd.*, 174 F.2d 63 (9th Cir. 1949); *cf. DHL Corp.* v. *Loomis Courier Service, Inc.*, —— F.2d —→ (9th Cir. 1975) [decided 8/7/75].

fixing, territory allocation, etc.), the regulation of which is also wholly within the province of the administrative agency.[3]

In those cases where the complained of action has an anticompetitive effect primarily confined to the regulated industry in question (including necessarily the effect on its consumers who are those primarily affected by any anti-competitive influences in the industry) and where the anti-competitive effects arise from regulation, conduct, accords, agreements, etc., which are wholly of an intra-industry nature, the only appropriate course of action for a district court to take when faced with a conflict between regulatory agency jurisdiction over these matters, and the court's own antitrust jurisdiction is: (1) to dismiss the antitrust action and refrain from itself acting until a review of the agency's determination of the matter comes before it, or (2) in the event that the agency does not have sufficient means to provide the full panoply of antitrust remedies sought, stay the proceedings in the District Court unitl after the regulatory agency has acted. *See Pan American* v. *United States, supra,* at 313 n.19; Report of the Attorney General's National Committee to Study the Antitrust Laws, 282 (1955).

The purpose of the *Pan Am* Rule is that when a regulatory agency has pervasive authority and the ability and expertise to exercise coordinated control over an entire industry and over all facets of that industry's industrial behavior, the agency having this overview of the entire

[3] *See, e.g., Price* v. *Trans World Airlines, Inc.,* 481 F.2d 844 (9th Cir. 1973); *Laveson* v. *Trans World Airlines, Inc.,* 471 F.2d 76 (3rd Cir. 1972); *Nader* v. *Allegheny Airlines, Inc.,* —— F.2d —— (D.C. Cir. 1975) [U.S.L.W. 2458].

industry is in the better position to resolve wholly intra-industry problems, and, being more attuned to the problems of the whole industry, better able to formulate and implement remedies which are flexible and deal with *all* of the intra-industry ramifications of an intra-industry problem. Whether this purpose is always achieved is sometimes in doubt. In essence, it reflects a congressional determination that continuing regulation is a better calibrated tool for dealing with and controlling anti-competitive behavior within an industry than the more blunt and generalized instrument of the antitrust laws. Agencies, because their interests are narrowed and fixed on one industry, may be better able to balance the competing interests within the industry and the welfare of the consumers of the industry's service or product. In light of these factors, the District Court is to refrain from immediate or hasty interference in intra-industry problems of industries subject to the control of a regulatory agency, until the regulatory agency has had an opportunity to carry out the functions for which it was initially created by Congress. The policy more simply stated is that when a matter is wholly an intra-industry problem the agency created to regulate that industry should initially determine that problem.

Where, however, the antitrust problem facing the court is not wholly confined to the regulated industry, other factors and policy considerations may substantially alter the desirability of according such substantial deference to an agency which does not have a perspective broader than its own industry, or the interest, expertise, power, or willingness to deal with an inter-industry problem.

Even were this a case where a firm in a regulated industry entered into a business not regulated by the

regulatory agency in question or vice versa (where a firm in an industry not regulated by the agency in question enters the regulated industry), and by either entry creates anticompetitive effects *confined* to the regulated industry, in such an instance the regulatory agency might still deserve to be accorded this same degree of deference since the agency still has an incentive to act because of the adverse economic effect on its own industry, and it would still have authority to act and the means to enforce its decisions due to its control over firms operating within the regulated industry. (*Cf. Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363 (1973).)

But in the instant case, the situation is different. Here we have Qantas, a firm engaged in a regulated industry, entering the tour industry, which is not *per se* regulated by the CAB, and its entry into this industry is alleged to have had an anticompetitive effect on the non-CAB-regulated tour industry. In this case, while the CAB has authority over Qantas, and arguably has the means to enforce an order against Qantas should it so choose, in lacking authority over all the parties, it cannot make the accommodations and effect the compromises which are the hallmark of agency regulation. It may well lack the means to deal with the total problem. But more importantly, the regulatory agency here also lacks the *expertise* and the *incentive* (—after all it is not its industry—) to act on an inter-industry problem. There is the danger that in cases such as this the regulatory agency might favor its own regulated industry at the expense of non-regulated commerce, or at the very least, might consider the resolution of such matters to be of a less pressing priority.

Where, as in the first of our examples, the complained of actions affect only intra-industry competition, and such anti-competitive actions (which would otherwise be outlawed), may, on approval by the regulatory agency, be thereby conferred a limited antitrust immunity, under statutes such as 49 U.S.C. § 1384, the reasoning, purpose and congressional intent behind such immunity statutes, being that integrated and pervasive regulation over an industry is thought of as a substitute for antitrust laws (*see* Report of the Attorney General's National Committee to Study the Antitrust Laws, 261-62 (1955)) makes them inapposite and inapplicable to cases such as the one now facing us which deal with inter-industry problems.

For instance, we do not think it would be seriously contended that the CAB could by its approval of a merger between an airline and a hotel chain, or by the memorialization of a resolution allowing airlines to go into the hotel business, legally permit an airline to monopolize the hotel business with impunity; nor if several airlines went into the hotel business, approve their dividing up of territories, or fixing prices in the hotel business. Neither do we think the CAB's approval of IATA Resolution 810 D & E permitting airlines to go into the tour business immunizes Qantas from an attempt (if proven) to monopolize the tour business over which the CAB in general has no control. The scope of the antitrust immunity which an agency's approval can confer under statutes such as 49 U.S.C. § 1384 was intended to be, and is, no broader than the industry regulated. *Butler Aviation Co.* v. *CAB*, 389 F.2d 517, 521 (2d Cir. 1968). A regulatory agency's approval of certain actions cannot confer antitrust immunity to those actions unless the primary anticompetitive effect those actions may have is limited to the industry in question.

Even though the CAB would not be able to "approve," and thereby grant immunity to acts having anticompetitive effects in an industry not regulated by the CAB, and even though the CAB does not have the expertise, incentive, or means to deal with all of the inter-industry ramifications of this problem, we do not imply that the District Court's action in staying its proceedings until the CAB reviewed the matter was erroneous. The fact that a regulated industry is involved and that some of the issues in this antitrust case deal with matters within the expertise of the regulatory agency, gives the CAB a substantial interest in this litigation, though not exclusive primary jurisdiction over it, since the matters are not confined to intra-industry effects. For example, a court may face a situation where a regulated firm's entrance into a business not regulated by the same agency has anticompetitive effects on firms both within and without the regulated industry, or, as in this case, where an agency's expertise may be a valuable aid to the court, or where the act complained of may constitute not only an un-immunizable antitrust violation, but also a violation of the regulatory agency's rules. In such situations, in the interest of comity and good judicial administration in seeking to interfere as little as possible with the workings of the regulatory agency, the courts should seek, if consistent with the interests of justice and the rights of injured parties not under the auspices of the agency, to stay its hand wherever possible to allow the regulatory agency to resolve the intra-industry aspects of the case first. But, in cases such as the instant case, where there is a substantial adverse effect on an industry not regulated by the agency in question, and in view of the reasons heretofore stated, the court should maintain its jurisdiction, and utilize its powers (including the issuance of preliminary injunctions), as it finds necessary.

In the case of *Wheelabrator Corp.* v. *Chafee,* 455 F.2d 1306 (D.C. Cir. 1971), the District of Columbia Circuit, facing a problem of overlapping agency and court jurisdiction, advanced an analogous accommodation between agency and judicial jurisdiction:

> "Plaintiff's application to the GAO in June did not preclude its subsequent application to the District Court, while the matter was still pending in GAO, for injunctive relief to prevent irreparable injury from the imminent bid opening. Under the doctrine of primary jurisdiction, a court may entertain an action for permanent relief and defer its consideration of the merits until an agency 'with special competence' in the field has ruled on the issues, if necessary maintaining the status quo pendente lite with injunctive relief avoiding irreparable injury pending such agency consideration. Brawner Building, Inc. v. Shehyn, 143 U.S.App. D.C. 125, 442 F.2d 847 (Feb 23, 1971). This doctrine has application to the General Accounting Office even assuming that its function is advisory since it has the special competence and experience that is the life and reason of the primary jurisdiction rule. Best v. Humboldt Placer Mining Co., 371 U.S. 334, 338, 83 S. Ct. 379, 9 L.Ed.2d 350 (1963); United States v. Western Pac. R. Co., 352 U.S. 59, 63-64, 77 S. Ct. 161, 1 L.Ed.2d 126 (1956). The court has the last word, but it can properly seek the benefit of whatever contributions can be made by an agency whose 'area of specialization' embraces problems similar to or inter-

meshed with those presented to the court. 3 K. Davis, Administrative Law Treatise § 19.09 at 53 (1958).

"The preliminary injunction by a court pending GAO determinations may provide a felicitous blending of remedies and mutual reinforcement of forums, since even the relatively expeditious GAO (fn. 13) may run into delays on decisions that undercut effectiveness of relief (see fn. 11). The preliminary injunction may be used to preserve the status quo and while securing for the court the benefit of the GAO's expertise. Where a court has warrant for issuing an injunction pending GAO determination it may be able to obviate the objection sometimes leveled at GAO's procedure, that the time required sometimes renders the matter moot prior to GAO's determination.

"In considering whether to extend a preliminary injunction, or issue a permanent injunction, against a procurement determination the court may properly take into account the GAO's concurrence in the executive determination, although the court does have the last word and should not shrink from exercise of its power when the conditions justify an injunction. Steinthal v. Seamans, 147 U.S.App. D.C. ——, 455 F.2d 1289, decided this day." (*Id.* at 1316-17.) (Footnote omitted.)

Having held that the District Court had jurisdiction to issue a preliminary injunction, we turn to the merits of the question of whether the court below should have issued the preliminary injunction on the facts of this case. Foremost needed to make a convincing showing on two points to be entitled to obtain a preliminary injunction against Qantas. First, that Foremost was being irreparably injured;[4] and second, that it is likely to prevail at trial on the merits. The opinion of the court below indicates to us the District Court had ample evidence to support each of these findings.[5] We do not find the District Court's granting of the preliminary injunction to be clearly erroneous.

We therefore *Affirm*.

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[4] We have exhausted every means of finding in the "cease and desist" provisions of 49 U.S.C. § 1381, a remedy as expeditious, fair, and equitable as that provided in the temporary injunction provisions of Rule 65 FRCivP.

The rules promulgated by the Civil Aeronautics Board implementing the provisions of § 1381, and other sections of Title 49 U.S.C. (14 C.F.R. § 302, *et seq.*) relating to proceedings before the C.A.B., are devoid of anything which would permit an administrative law judge or the board to expedite proceedings under § 1381. There is no provision for a *temporary* cease and desist order, nor is anything in the regulations which would permit the judge or the board to shorten the procedure in this type of proceeding. § 1381 requires notice and a hearing. § 302.35 C.F.R., providing for a "shortened procedure" in certain instances, is not applicable to § 1381, which requires a hearing. The procedures provided in C.F.R. 302.1301, *et seq.*, and 302.1401, *et seq.*, have no application to hearings under 49 U.S.C. § 1381. We are forced to conclude that Foremost might lose its entire business while attempting to get a cease and desist order under the mentioned statute.

[5] "18 In April 1973 Foremost sold 310 (passenger) tours; in April 1974, 102. In May 1973 Foremost sold 581 tours; in May 1974, 65. In June 1973 Foremost sold 539 tours, as of June 20, 1974, 29."

"21 Certain inquiries have been made by telephone of Qantas reservations staff in Honolulu since April 1, 1974, concerning Foremost's Royal Road Tours. On such occasions, Qantas reservations staff have furnished the person making the request with information relating to Qantas' Holiday Tours in the South Pacific rather than Foremost's Royal Road Tours. On at least one occasion Qantas switched a specific request for a Royal Road Tour to a Qantas Holiday Tour without informing the tour agent of the change."

Foremost International Tours, Inc. v. *Qantas, etc.*, 379 F. Supp. 88, 92 (1974), Findings 18 and 21.

The Opinion of the District Court
For the District of Hawaii

Civ. No. 74-116.

United States District Court,
D. Hawaii.

July 26, 1974.

FOREMOST INTERNATIONAL TOURS, INC.,
Plaintiff,

v.

QANTAS AIRWAYS LIMITED, Doe One through Doe Ten, Inclusive,
Defendants.

DECISION

PENCE, *District Judge.*

Founding its complaint upon past and present business activities between itself and Qantas Airways Limited (Qantas), as more fully set out hereafter, Foremost International Tours, Inc. (Foremost) has brought this antitrust action against Qantas.

Foremost alleges that Qantas violated Sections 1 and 2 of the Sherman Act and seeks monetary and injunctive relief under Sections 4 and 16 of the Clayton Act. 15 U.S.C. §§ 1, 2, 15, 26. This court has jurisdiction under 28 U.S.C. § 1331, 1337. The matter is presently before the court on Foremost's motion for a preliminary injunction and Qantas' cross-motion for summary judgment. Evidence has

been taken, and the preliminary issues have been argued and briefed.

Findings of Fact

1. Foremost is a corporation organized and existing under the laws of the State of Hawaii with its principal place of business in Honolulu, Hawaii.

2. Qantas is a public company incorporated in the State of Queensland, Australia, under the laws of the Commonwealth of Australia, with its principal place of business in Sydney, Australia.

3. Foremost is engaged in the business of packaging, producing and operating Royal Road Fly/Drive, Fly/Coach and Fly/Tour tour programs to Australia and New Zeland from the United States of America, Canada, and other areas. The relevant tour programs consist of (1) air transportation to Australia and New Zealand from the United States and Canada, and (2) a land portion of the tour consisting of hotel accommodations, sightseeing and land transportation in Australia and New Zealand.

4. Although no permit is on file with this court, it would appear that within the meaning of § 101(19) of the Federal Aviation Act of 1958, 49 U.S.C. § 1301(19), Qantas is the holder of a foreign air carrier permit issued by the Civil Aeronautics Board with the approval of the President of the United States pursuant to §§ 402 and 801 of the Federal Aviation Act of 1958, 49 U.S.C. §§ 1372, 1461, authorizing Qantas to engage in foreign air transportation between,

inter alia, the United States and Australia and New Zealand.

5. Prior to March 31, 1974, Foremost as tour producer and wholesaler and Qantas as the sponsoring airline, pursuant to agreement, conjoinedly marketed tour programs to Australia and New Zealand from the United States and Canada known as Royal Road Tours and which included Fly/Drive, Fly/Coach and Fly/Tour tours. Qantas furnished the air transportation and paid for, in part or sometimes all, directly or indirectly, advertising and promotional tour brochures for such tours. The brochures used were of distinctive format and colors. They were not protected by copyright. Foremost arranged for and operated the land portion of such tours.

6. The agreement pursuant to which Foremost and Qantas jointly marketed tour programs to Australia and New Zealand from the United States and Canada, known as Royal Road Tours and which included Fly/Drive, Fly/Coach and Fly/Tour tours, on its face appeared to be renewable annually at the sole option of Qantas. The annual term of the agreement was from April 1 to March 31. On November 7, 1973, Qantas verbally advised Foremost that the agreement would not be renewed beyond March 31, 1974 and subsequent written confirmation was given to Foremost by Qantas by letter dated December 13, 1973.

7. Foremost is a wholesaler of tour programs. Foremost does not sell its tour programs to the public directly but sells through retail outlets consisting of retail travel agents and ticket offices of those airlines who are sponsoring or

participating airlines in the tour programs produced by Foremost as a wholesaler.

8. Commencing April 1, 1974, Qantas commenced to market Fly/Drive, Fly/Coach, Fly/Tour and Fly/Rail tours to Australia and New Zealand from the United States and Canada through the in-house tour department of Qantas known as Qantas Holidays. The effect of this was to place Qantas, as an air carrier, in direct competition with Foremost in the marketing of such tour programs.

9. Foremost, as a wholesaler, after Qantas terminated their agreement, entered into an agreement with Air New Zealand effective April 1, 1974, whereby Air New Zealand became the sponsoring carrier of the Royal Road Tour programs packaged, produced, sold and operated by Foremost. Air New Zealand designated British Airways as a participating carrier in this tour program.

10. Qantas, commencing April 1, 1974, commenced selling its Fly/Drive, Fly/Coach, Fly/Tour, Fly/Rail tours from the United States and Canada to Australia and New Zealand directly through retail travel agent outlets and airline ticket office outlets, as well as sub-wholesalers. Its promotional brochures were almost identical in format and color to the 1973 brochures used by Foremost

11. In 1967 the International Air Transport Association (IATA) filed Resolution 810D with the Civil Aeronautics Board pursuant to § 412 of the Federal Aviation Act of 1958, 49 U.S.C. § 1382. Resolution 810D defines principles under which inclusive tours may be operated by IATA

members, such as is Qantas. IATA Resolution 810E contains rules applicable to tour operators such as Foremost who develop, organize and promote inclusive tours for sale by individual IATA travel agents via the scheduled services of IATA members such as Qantas. The IATA Resolutions 810D and 810E were approved by the Civil Aeronautics Board pursuant to § 412 of the Federal Aviation Act of 1958, 49 U.S.C. § 1382, on March 23, 1967 in Order No. E-24886 in Docket 17828.

12. As required by § 403 of the Federal Aviation Act of 1958, 49 U.S.C. § 1373, Qantas International Passenger Fares Tariff No. 3 was filed with and approved by the Civil Aeronautics Board, effective March 20, 1974. This tariff provides in pertinent part, with respect to South Pacific group inclusive tour fares, in Rule 82-A of said tariff, the following:

A. The tour must include in the published price and tour literature:

(1) Sleeping accommodation for the total duration of the tour in hotels, motels or commercially operated pensions;

(2) A program of sightseeing and/or entertainment features on at least half the number of days in the total trip.

B. The minimum selling price of the tour per passenger shall not be less than the applicable group inclusive tour fare plus U. S. $130 for the minimum stay plus $10 for each day of the tour in excess of the minimum stay for which tour features are provided.

The "minimum selling price" does but mean that when all properly allocable per-passenger costs of the tour are added up, that figure shall not fall below the $130 + $10 per excess day minimum of B, *supra.*

13. The group inclusive tour fare contained in Qantas' International Passenger Fares Tariff No. 3 is $674.10 between Sydney, Australia and West Coast points of the United States or Vancouver, Canada. Thus under Qantas' Tariff No. 3, Qantas cannot sell a South Pacific group inclusive 10-day tour for less than $ U.S. 674.10 + $130.00, viz., $804.10, even if the land portion should not "cost" Qantas $130.00.

14. Commencing April 1, 1974, Qantas has been selling a 10-day group inclusive tour to Australia at a price of $805. Although Qantas broke down the tour as "costing":

A. Air fare—$674.10

B. Land transportation in the form of car rental—$40.84

C. Hotel Accommodations—$59.40

D. Ten percent commission on the gross land cost to the retail agent—$13.90

E. Gross profit for Qantas on the gross land cost—$17.57,

items C and E are "as phony as a $3 bill." The "hotel" price was deliberately solicited and secured by Qantas for the sole purpose of fictitiously complying with the truth in advertising requirements of the Federal Trade Commis-

sion of the United States. By the terms of the hotel's letter to Qantas (Ex. D2), the room rate purportedly was limited by the hotel to one tour of 15 persons on a once only basis, but in fact it was never intended to be used or sold by either Qantas or the hotel, and Qantas never sold any such tour. The "profit" was nonexistent and fictitious. Qantas used it only to pro forma comply with the Federal Trade Commission requirements and as a "bait and switch" sales technique.

15. On all its tours, Qantas bases its cost figures on what it refers to as its "in-house" exchange rate: $A 1.00= $US 1.485. The actual rate of exchange, as quoted by the Bank of America in San Francisco on April 1, 1974, when the Qantas tours went on the market, was $A 1.00=$US 1.4925. It has remained virtually unchanged since that date.

16. Commencing April 1, 1974, Qantas has been selling a 14-day group inclusive tour to Australia at a price of $US 899.00. This encompasses the following (at Qantas' "in-house exchange rate"):

A. Air fare—$674.10

B. Land transportation in the form of car rental—$40.84

C. Hotel accommodations—$161.13

D. Ten percent commission on the gross land cost to the retail agent—$22.49

E. "Gross profit" on land portion of tour—44 cents.

If Bank of America exchange rates were used, a "loss" of 57 cents results.

17. Qantas does not allocate any of its overhead expenses, office administration, advertising or brochure expenses as "costs" in its representations to this court as to the "cost" of the land portion of any of its tours.

18. In April 1973 Foremost sold 310 (passenger) tours; in April 1974, 102. In May 1973 Foremost sold 581 tours; in May 1974, 65. In June 1973 Foremost sold 539 tours; as of June 20, 1974, 29.

19. Foremost as a tour wholesaler is not receiving any type of rebate, kickback or other form of payment in connection with its Royal Road Tour program being operated with Air New Zealand as the sponsoring airline.

20. Foremost pays a portion of the cost of promotional Air New Zealand Royal Road Tour brochures. It is required to pay for all trade advertising for its Royal Road Tours. Air New Zealand would provide national advertising.

21. Certain inquiries have been made by telephone of Qantas reservations staff in Honolulu since April 1, 1974, concerning Foremost's Royal Road Tours. On such occasions, Qantas reservations staff have furnished the person making the request with information relating to Qantas' Holiday Tours in the South Pacific rather than Foremost's Royal Road Tours. On at least one occasion Qantas switched a specific request for a Royal Road Tour to a Qantas Holiday Tour without informing the tour agent of the change.

22. The relevant market here involved is the packaging, producing, operating and marketing of "freewheeling" tours offered in conjunction with tour-basing airfares in tours from the United States and Canada to Australia and New Zealand. Freewheeling tours are without fixed itineraries but making hotel accommodations and local transportation available to the tour passenger. They are commonly called Fly/Drive, Fly/Coach, Fly/Tour or Fly/Rail travel programs.

I

Legal Analysis And Conclusions

This court is here faced with the recurrent and intricate task of applying the antitrust laws within a regulated industry, here the airlines. The five opinions rendered by the Supreme Court in the 1972-73 term have added all too little clarification to the confusion extant in the law on antitrust actions involving regulated industries.[1] *See* Robinson, Antitrust Developments: 1973, 74 Colum.L.Rev. 163 (1974). Defendant's motion for summary judgment is based on two arguments: (1) Qantas' entry into the South Pacific Fly/Drive inclusive tour market is exempt from the

[1] The Supreme Court applied the antitrust laws to a public utility and to a shipper in Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973), and Federal Maritime Comm'n v. Seatrain Lines, Inc., 411 U.S. 726, 93 S.Ct. 1773, 36 L.Ed.2d 620 (1973), respectively; deferred to the Civil Aeronautics Board in Hughes Tool Co. v. TWA, 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973); required the Federal Power Commission to consider antitrust policies in Gulf States Utilities Co. v. FPC, 411 U.S. 747, 93 S.Ct. 1870, 36 L.Ed.2d 635 (1973); and referred a conspiracy charge to the Commodity Exchange Commission for initial investigation in Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973).

operation of antitrust laws because authorized by an IATA resolution that was approved by the Civil Aeronautics Board (CAB). (2) Foremost's remaining claims, based upon unfair competition and deceptive practices, are within the primary jurisdiction of the CAB.

It is elementary that the Federal Aviation Act (Act) 49 U.S.C. § 1301 et seq., does not displace the antitrust laws in the air transportation industry. Pam American World Airways, Inc. v. United States, 371 U.S. 296, 304-305, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). The Act therefore does not automatically immunize the allegedly monopolistic acts of Qantas in this case. Even assuming that the CAB has "approved" the entry of Qantas into the inclusive tour business[2] and that Qantas met the minimum inclusive tour prices required by tariffs filed with the CAB, it would not be exempt from the antitrust laws. Section 414 of the Act provides that "any person affected by any order [affecting air transportation] shall be . . . relieved from the operations of the 'antitrust laws' . . . insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." 49 U.S.C. § 1384.[3] The Supreme Court interpreted that pro-

[2] The evidence of "approval" is not entirely clear. Qantas cites IATA Resolution 810D (approved by CAB Order No. E-24598) as authorizing its entry into the inclusive tour business. This resolution is entitled "Inclusive Tours Initiated by Members". But the term "initiated" is nowhere defined nor is the effect of the "approval" anywhere outlined.

[3] Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraint or prohibitions made by, or imposed under, authority of law, insofar as may be

vision in Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973), which involved an antitrust claim that the airline had been injured by Hughes' control over the financing and flow of new aircraft to TWA. The Court found that the CAB had considered all of the prior dealings between the parties each time it had approved Hughes' acquisition of increased control over TWA; and, furthermore, that the agency had required Hughes to obtain its approval in connection with all significant purchase and sale transactions between the two companies. 409 U.S. at 379, 93 S.Ct. 647. The Court accordingly held that the CAB's specific actions conferred immunity upon the transactions in controversy. The Court emphasized that

> "from 1944 through 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required Board approval. Each transaction was approved by the Board and each approval was an order under § 408, for the Board regarded its transactional orders as modifications or interpretations of its antecedent control order. Each of the modification orders recited a finding of the Board that the transactions were 'just and reasonable and in the public interest.'" *Ibid.*

While the entry of Qantas into the inclusive tour business and its pricing of tours according to tariffs might superfi-

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necessary to enable such person to do anything authorized, approved, or required by such order. 49 U.S.C. § 1384.

IATA Resolution 810D, which purports to approve the entry of airlines into the inclusive tour business, was filed with the CAB under section 412(a). This section requires every air carrier to file "agreements . . . affecting air transportation." 49 U.S.C. § 1382(a).

cially appear to come within the terms of the statute as "authorized" by a CAB order, the CAB never carefully scrutinized or particularized these acts as required by *Hughes Tool.* The CAB approved IATA resolution 810D in memorandum Order No. E-24598. This purports to authorize all airlines to enter the inclusive tour business. Since the order is dated January 3, 1967, and Qantas only commenced operating its own tours after April 1, 1974, the CAB could not possibly have considered the consequences of Qantas marketing its own tours in the Pacific market. Generally approving the entry of airlines into the inclusive tour business is a far cry from CAB's approval of "every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco," as in *Hughes Tool.*

Qantas' position that compliance with the minimum inclusive tour prices required by tariffs filed with the CAB exempts it from the operation of the antitrust laws is similarly untenable. Not only did the CAB approve 810D long before Qantas entered the inclusive tour market, but the CAB never analyzed the costings behind Qantas' land tour portions in its Fly/Drive tour prices charged the public. The relationship between the costs and the price of the land portion of the tours is a basis of this lawsuit. Since the CAB did not consider the costs of the land tour components to Qantas when it approved Qantas minimum tariff price, the agency scrutiny of the entry of Qantas into the inclusive Fly/Drive tour market and its pricing of tours was not sufficiently specific to immunize those transactions from the antitrust laws.

II

Although section 414 does not exempt Qantas from the operation of the antitrust laws, this court concludes

that entry of Qantas into the inclusive tour business and its below cost pricing practice, switching of tours, as well as the other charges of anticompetitive activity—terminating a business relationship, obtaining confidential information, imitating Foremost's brochures, boycotting, tyings, and dividing the market—are within the initial jurisdiction of the CAB under section 411. 49 U.S.C. § 1381.[4] That section provides that the CAB may, "upon its own initiative or upon complaint by any . . . ticket agent, . . . investigate and determine whether any . . . foreign air carrier . . . has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof."

Section 101 defines "Ticket agent" as "any person . . . who . . . negotiates for, or holds himself out by solicitation, advertisement, or otherwise as one who sells, provides, furnishes, contracts or arranges for, such transportation." 49 U.S.C. § 1301 (34). Foremost brochures state that:

> Yes, ROYAL ROAD TOURS were first to provide a Fly/Drive Tour in the South Pacific and continue to be first by offering once again, the popular Fly/Drive Tour to Australia FOR MUCH LESS than the normal air fare alone.
>
> • • •
>
> The Standard Fly/Drive Tour not only provides the roundtrip flight to Sydney with arrival transfer [etc.].

[4] The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition. 49 U.S.C. § 1381.

With its own brochure, Foremost purports to "arrange for" air transportation. Foremost is thus a ticket agent within the meaning of the statute and therefore has standing to file a complaint with the CAB against Qantas.

While the CAB's jurisdiction under section 411 includes the authority to investigate "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof", Foremost argues that the CAB is not empowered to regulate the land tour business because it is not encompassed within the meaning of the phrase "air transportation or the sale thereof." Neither the legislative history of the Act nor the CAB's regulations crystallizes the meaning of that phrase.[5] The essence of plaintiff's complaint is that Qantas has subsidized the land portion of its below cost inclusive tours with profits from the sale of its airline seats. In this case, since Qantas'

[5] The CAB regulates inclusive tours. *See* 14 C.F.R. § 378 (1974). However, except for the provision that a Tour Prospectus be filed with the CAB, *id.* 378.10, the requirements of Part 378 govern "tour operators" and "foreign tour operators". Qantas is not a foreign tour operator within the meaning of that section, *id.* § 378.2(d-1), and, therefore, not directly governed by § 378.12, which prohibits tour operators and foreign tour operators from engaging in "unfair or deceptive practices or unfair methods of competition." However, this court will not impute to Congress or to the CAB the anomaly of regulating under the Federal Aviation Act, tours operated by non-airlines, while ignoring the excesses of airline tour operators.

sales of the land tours and the air passage are deliberately intermixed, both should come within the meaning of the phrase "air transportation or the sale thereof." This court holds that the CAB has jurisdiction of such allegations in Foremost's complaint.

With the scope of the CAB's power in mind, this court therefore follows the course set by The Court in Ricci v. Chicago Mercantile Exchange, 409 U.S. 289, 93 S.Ct. 573, 34 L.Ed.2d 525 (1973). It will exercise antitrust jurisdiction over the parties' controversy but stay most proceedings thereunder pending CAB's determination of Foremost's complaint before the CAB.[6] In *Ricci*, a member on a commodities exchange alleged that another trader and the exchange itself unlawfully conspired to deprive him of his membership. The Court held that, although the Commodity Exchange Act did not unambiguously provide Ricci with an opportunity to seek complete redress, *Id.* at 304, 93 S.Ct. 573, the complaint should first be referred to the agency, stating:

> "This judgment rests on three related premises: (1) that it will be essential for the antitrust court to determine whether the Commodity Exchange Act or any of its provisions are 'incompatible with the maintenance of an antitrust action,' Silver v. New York Stock Exchange, [373 U.S. 341, 358, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963)]; (2) that some facets of the dispute between Ricci and the Exchange are within the statutory jurisdiction of the Commodity Exchange Commission; and (3) that adjudication of that dispute by the Commission promises to be of material aid in resolving the immunity question." *Id.* at 302, 93 S.Ct. at 580.

[6] In Pan American World Airways, Inc. v. United States, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Supreme Court held that courts should dismiss complaints presenting questions entrusted by Congress to the CAB. However, in light of The Court's applying the Sherman Act to a public utility's refusal to sell power at wholesale in *Otter Tail*, and its referring an alleged conspiracy to the Commodity Exchange Act in *Ricci*, if *Pan American* were decided today, this court, too, concludes that The Court would refer the dispute to the CAB for a preliminary determination rather than dismiss the action outright. *Cf.* Robinson, *supra*, at 178.

Ricci points out that, in certain instances, courts are unable, without agency expertise, to minimize conflicts between regulatory statutes and the antitrust laws. This rationale thus compels referral of the instant case to the CAB. Many of Foremost's charges of anticompetitive activity by Qantas, especially its entry into the inclusive tour market and its subsidizing of the land tour portions with profits from airline seats, are eminently within the CAB's expertise. Operation and sale of inclusive tours by airlines and subsidizing this portion of their operation in order to sell more seats might well be in the public interest. Vertical expansion apparently has lowered the costs of tours to the public and mayhap should be encouraged. Other airlines might also vertically expand and compete with Qantas, thus adequately protecting the public. This court feels that it would be better equipped to make the determinations necessary under the antitrust aspects of this case with some enlightenment from the CAB.

This procedure does not prejudice Foremost. Should the CAB determine that Foremost is not a "ticket agent" within the meaning of the Act, or that the inclusive tour

business is not within the scope of the CAB's jurisdiction, or should refrain from action for any reason, this court would, of course, then undertake to decide the complex problems of vertical expansion and subsidies in the airline industry, and their actual or possible antitrust implications without CAB assistance.

III

This court is aware of the language in *Pan American, supra,* that section 411 of the Act leaves to the CAB questions of injunctive relief in certain areas. 371 U.S. at 310, 83 S.Ct. 476. However, underlying this interpretation is the conclusion that if "courts . . . intrude independently with their construction of the antitrust laws, two regimes might collide." *Ibid.* Neither the Act nor the regulations appear to authorize the CAB to grant the preliminary relief Foremost seeks.[7] Since a preliminary in-

[7] In 1972, Congress vested the CAB with specific authority to suspend or reject the tariffs of foreign air carriers. Act of Mar. 22, 1972, 86 Stat. 96, Pub.L. 92-259. Thus, the CAB has jurisdiction to grant preliminary relief against foreign air carriers in certain instances:

> With respect to any existing tariff of an air carrier or foreign carrier stating rates, fares, or charges for foreign air transportation, . . . the Board . . . may suspend the operation of such tariff . . . for a period . . . not exceeding three hundred and sixty-five days. . . . 49 U.S.C. § 1482(j)(2).

However, it does not appear that the CAB has jurisdiction under this section to suspend the inclusive tour fares of Qantas. The statute resulted from Lufthansa's low proposed excursion air fare. 1972 U.S. Code Cong. & Admin. News pp. 2100, 2101. The House Report states that the "legislation is, however, strictly limited in its scope and does not pretend to solve all of the ills and problems of international air transportation." *Id.* at p. 2102. More specifically, the Report further states that the bill applies to "charges for foreign air transportation." *Id.* at p. 2103. The Report nowhere discussed inclusive tour fares. Therefore, the CAB can only deal with the allegations in Foremost's complaint by issuing a cease and desist order under § 1381.

In the event the CAB interprets broadly its jurisdiction under § 1482(j) and suspends or modifies Qantas' inclusive tour fares, this court would then terminate any portions of the preliminary injunction thus jointly acted upon. This procedure satisfies the rule of *Pan American* that courts are to avoid interfering with the CAB.

junction by this court does not interfere with the CAB's jurisdiction, *Pan American* does not preclude giving the limited injunctive relief herein sought. Just as litigants may sue for damages alleged to have occurred by reason of antitrust violations of the kind with which the CAB has authority to deal only by issuing a cease and desist order, Aloha Airlines, Inc. v. Hawaiian Airlines, Inc., 489 F.2d 203, 208 (9th Cir. 1973), antitrust litigants are entitled to preliminary injunctions when warranted by law and fact. Cf. Arrow Transportation Co. v. Southern Railway Co., 372 U.S. 658, 83 S.Ct. 984, 10 L.Ed.2d 52 (1963).

The danger that Foremost will suffer irreparable injury before the CAB has investigated the charges of deceptive practices and unfair methods of competition is very real. Foremost has established that the existence of its business life as a competitor in the freewheeling tour market is threatened. This is a sufficient showing of irreparable injury to warrant a preliminary injunction even though the amount of direct financial harm might be ascertainable. Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205 (2d Cir. 1970) (per Friendly, *J.*); 11 C. Wright & A. Miller § 2948 at 440 (1973). Courts should be particularly concerned with threats to the existence of a moving party's business in the area of antitrust. An award of

only money damages in lieu of preserving a competitor disserves the public interest.

Qantas argues that Foremost has not demonstrated that it is suffering irreparable harm as a result of Qantas' conduct. It argues that Foremost's injury results solely from the depression in the airline and tour industry: fewer people are traveling from the United States to the South Pacific. However, a plaintiff seeking relief under Section 16 of the Clayton Act need not show actual injury caused by defendant's anticompetitive conduct. He "need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur (citations omitted)." Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969). Since Qantas' below cost pricing and other anticompetitive actions establish a prima facie violation of the antitrust laws,[8] Foremost need not now prove that its present loss

[8] Entirely distinct from monopolization, § 2 of the Sherman Act may be violated by an attempt to monopolize, even though the desired end of monopoly power is not attained. *See* American Bar Ass'n, Antitrust Developments 1955-1968 (1968) at 37. Plaintiffs need only prove a specific intent to monopolize and the dangerous probability of success. *See, e.g.*, Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626, 73 S.Ct. 872, 97 L.Ed. 1277 (1953); American Tobacco Co. v. United States, 328 U.S. 781, 785, 66 S.Ct. 1125, 90 L.Ed. 1575 (1946); Cornwell Quality Tools Co. v. C. T. S. Co., 446 F.2d 825, 832 (9th Cir. 1971), cert. denied, 404 U.S. 1049, 92 S.Ct. 715, 30 L.Ed.2d 740 (1972).

Since intent to monopolize can be proved by direct evidence only in rare instances, plaintiffs must establish the requisite intent with circumstantial evidence. Foremost has made an unrebutted prima facie showing that Qantas is marketing tours below cost. Below cost pricing may be evidence of violations of the antitrust laws. Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F.Supp. 476, 483 (E.D.Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966); *cf.* National Dairy Prods. Corp. v. United States, 350 F.2d 321, 330 (8th Cir. 1965), vacated and remanded on other grounds, 384 U.S. 883, 86 S.Ct. 1913, 16 L.Ed.2d 995 (1966). The evidence also establishes that, at least on one occasion, a Honolulu travel agent requested from Qantas a Foremost Royal Road Tour, but was given a Qantas Holidays Tour.

The evidence also satisfies the requirement of a dangerous probability of success. Qantas controls a significant portion of the per week seat capacities in the United States-South Pacific market, and is owned by the Australian government. With this leverage and its ability to absorb costings and overhead in its air fare, it poses as an awesome competitor in the inclusive tour market. The evidence also establishes that, by imitating Foremost's brochures of last year, Qantas is capitalizing on the good will accumulated by its former associate. While the evidence presented might not establish that Foremost will certainly prevail at trial, it clearly supports a preliminary injunction.

of business results from Qantas' activity. As a result of below cost pricing by Qantas, it follows that future passengers to the South Pacific will purchase Qantas tours rather than Foremost tours, and Foremost will be irreparably injured.

Foremost seeks to enjoin Qantas from operating any tours to Australia or New Zealand. However, this form of an injunction would unduly burden Qantas. Foremost is adequately protected by an order, inter alia, enjoining Qantas from selling its tours at prices that do not include all of the costs actually attributable to the land portions plus a reasonable allocation of its office administration and general overhead expenses and, further, prohibiting Qantas from shifting to itself business committed to or intended for Foremost.

ORDER

In accordance with the foregoing findings and conclusions, it is ordered, adjudged, and decreed that:

1. Foremost's Motion for a Temporary Injunction restraining and enjoining Qantas from operating an in-house tour program in the South Pacific tour market in competition with Foremost is Denied.

2. The matters alleged in the complaint relating to the questions whether an airline such Qantas may conduct an in-house tour operation, whether the acts of Qantas alleged in the complaint constitute unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof and whether the acts of Qantas alleged in the complaint have anticompetitive effects, are within the initial jurisdiction of the Civil Aeronautics Board under § 411 of the Federal Aviation Act of 1958, 49 U.S.C. § 1381. Further proceedings in this case in respect of these matters are stayed pending review, consideration, determination and findings by the CAB of these matters in accordance with § 411 of the Act.

3. The court retains jurisdiction of the alleged antitrust violations, including but not limited to alleged sales below cost, alleged shifting of tour requests, the alleged conspiracy with Canadian Pacific Airlines Limited and their alleged refusal to deal. The preceding is not to be interpreted as manifesting any intent by this court to restrict the scope of the CAB's investigation of and rulings upon any or all of the issues presented by Foremost's complaints. The motion of Qantas for dismissal of the complaint and summary judgment is Denied as to this aspect of the case.

4. Not enough evidence has been presented at this stage of the proceedings from which the court can conclude that there is a conspiracy with Canadian Pacific Airlines Limited

to monopolize or exclude Foremost from the South Pacific tour market or that Canadian Pacific Airlines has refused to deal with Foremost. Accordingly, no preliminary injunction shall issue with respect to these allegations in the complaint and Foremost's motion in that respect is Denied.

5. Pending final determination of this action, Qantas is hereby restrained and enjoined from selling inclusive "free-wheeling" tours until it has satisfied this court that the portion of the tour price applicable to the land costs includes not only the actual costs charged to Qantas for the land services, including ground and local air transportation services and hotel accommodation, but also generally including, but not limited to, administration expenses, office expenses, salaries, general in-house expenses and, possibly, advertising and brochure costs, related to Qantas' Holiday tours.

6. Pending final determination of this action,

(a) Qantas is hereby restrained and enjoined from continuing to advertise or otherwise offering for sale or selling any of its inclusive South Pacific tours, currently offered, at the prices now set forth in its tour brochures and other advertising media until it has satisfied this court that the land tour portion thereof meets and correctly reflects Qantas' costs, as set out in number 5, *supra,* and this court has approved the same.

(b) In implementing the above restraints,

(1) within 30 days after the effective date of this order, Qantas shall withdraw or otherwise nullify the current authenticity of all of its brochures that contain the above proscribed tour prices;

The Opinion of the District Court
For the District of Hawaii

(2) within 60 days after the effective date of this order, Qantas shall withdraw from its advertising in any news media any reference to the above proscribed tour prices.

7. Pending final determination of this action, Qantas is hereby restrained and enjoined from shifting or attempting to shift to Qantas Holiday Tours, passengers who have requested or otherwise sought to purchase a Foremost Royal Road Tour to the South Pacific.

8. Foremost is hereby required, pursuant to § 16 of the Clayton Act, 15 U.S.C. § 26, to give security in the sum of $1,000.00 for the payment of such costs and damages as may be incurred or suffered by Qantas if found to have been wrongfully enjoined, as a condition precedent to the entry into effect of the preliminary injunction to be entered herein.

9. The effective date of the preliminary injunction shall be stayed by this court for a period of ten days from the date of filing in this court to allow Qantas to apply to the United States Court of Appeals for the Ninth Circuit for a further stay pending appeal from the granting of the preliminary injunction.

Judgment of the United States Court of Appeals
For the Ninth Circuit

OFFICE OF THE CLERK

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building

7th & Mission Streets, P. O. Box 547

San Francisco, California 94101

Oct 22 1975

74-3463—Foremost International Tours, Inc. v.

Qantas Airways Limited, et al.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a Judgment was entered Oct 22 1975 Affirming the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk

U. S. Court of Appeals

Order of the United States Court of Appeals For the Ninth Circuit Denying Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 74-2463

FOREMOST INTERNATIONAL TOURS, INC.,

Plaintiff-Appellee,

v.

QANTAS AIRWAYS LIMITED, DOE ONE through DOE TEN, Inclusive,

Defendants-Appellants.

Before:

BARNES, KILKENNY and GOODWIN,

Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing *en banc*.

The full Court has been advised of the suggestion for an *en banc* hearing, and no judge of the Court has requested a vote on the suggestion for rehearing *en banc*. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing *en banc* is rejected.

Complaint Filed in the District Court

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UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

Civil No. ———

COMPLAINT FOR DAMAGES AND FOR DECLARATORY AND INJUNCTIVE RELIEF

FOREMOST INTERNATIONAL TOURS, INC.

Plaintiff,

—vs.—

QANTAS AIRWAYS LIMITED, DOE ONE through DOE TEN, Inclusive,

Defendants.

Comes now Plaintiff and, demanding trial by jury, complains and alleges as follows:

Complaint Filed in the District Court

I

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the named Defendants to recover damages and to secure declaratory and injunctive relief for violations of the antitrust laws as hereinafter alleged, pursuant to Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26), Section 2201 of Title 28 of the United States Code and Rules 57 and 65 of the Federal Rules of Civil Procedure.

2. Defendant Qantas Airways Limited maintains an office, transacts business and is found within the District of Hawaii and is within the jurisdiction of this court for the purpose of service. Many of the acts done in violation of the antitrust laws as hereinafter alleged have been performed within the District of Hawaii, and the interstate and foreign commerce hereinafter described is carried on, in part, within the District of Hawaii.

II

Parties

3. Plaintiff Foremost International Tours, Inc., (hereinafter called "Foremost") is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Hawaii, with its principal offices located in Honolulu, Hawaii. At all times mentioned in this complaint, Plaintiff has been engaged in the business of a wholesale tour operator.

Complaint Filed in the District Court

4. Defendant Qantas Airways Limited (hereinafter called "Qantas") is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Queensland, Australia, and which maintains offices and transacts business within the District of Hawaii. Defendant is in the business of operating air transportation to and from the United States, and is certified as a foreign air carrier for that purpose by the United States Civil Aeronautics Board (hereinafter called "CAB"). Qantas operates approximately one-third of all airline seat capacity flown from the United States and Canada to Australia.

5. Defendants Doe One through Doe Ten, inclusive, are sued herein under fictitious names for the reason that their true names and capacities, whether individual, corporate, associate or otherwise are unknown to Plaintiff. When said true names and capacities are ascertained, Plaintiff asks leave to amend this complaint so to state.

III

Co-Conspirators

6. Co-conspirator CP Air (hereinafter called "CP"), a Canadian corporation, and Doe Eleven through Doe Twenty, not named as defendants herein, have contracted, combined and conspired with Defendant Qantas for the purpose of allowing Qantas to monopolize and restrain trade, as hereinafter alleged.

IV

Nature of Trade and Commerce

7. Plaintiff Foremost is a wholesale tour operator with offices in Honolulu, Hawaii; San Francisco, California;

Sydney, Australia; and Auckland, New Zealand. Since 1969, its principal business has been the producing, promoting and selling of tour programs to the South Pacific, primarily to Australia and New Zealand.

The words "tour" and "tour program" herein refer only to transportation facilities and hotel arrangements within the country or countries visited by the traveler; air transportation to and from these countries is provided by a cooperating air carrier, under the regulations of the International Air Transport Association.

8. The International Air Transport Association (hereinafter called "IATA"), a Canadian corporation, is a trade association of international air carriers. Its primary function is the regulation of international airfares which are determined at an annual conference of the member carriers. IATA is empowered to enforce the agreed-upon fare structures by imposing fines upon members for any violations that it detects. All scheduled air carriers to the South Pacific are members of IATA. IATA-determined fares which affect air transport to and from the United States are also subject to approval by the CAB. In addition to normal full-rate fares, IATA and the CAB also permit special "tour-basing" fares. These can only be offered in conjunction with the so-called "inclusive tour", or "IT", which must include such prepaid ground arrangements as hotel accommodations, local transportation, sightseeing and other facilities. The minimum cost and content of these ground arrangements are set by IATA regulations. Tour-basing fares are significantly lower than the normal full-rate fares, and make possible the mass marketing of tour program upon which the tour operator's business depends.

9. IATA rules sharply restrict the circumstances under which tour-basing fares may be offered to the public. Inclusive tours are to be produced only by a tour operator, defined in the rules as "a person other than an IATA member who produces and promotes the inclusive tour." Qantas is an IATA member while Foremost is not. The tour operator thus prepares a tour program which can be sold only with the cooperation of an air carrier. The operator must apply to the carrier for specific approval of each tour before he can begin to market it. He must submit the application on a standard IATA form to the "sponsoring" carrier, along with copies of the proposed tour literature. It is only when the carrier approves the inclusive tour, and assigns an "IT" number to it, that the tour can be marketed with the low tour-basing airfare. All tour literature must display the appropriate "IT" number. In return for such sponsorship, the tour operator may agree to restrict the tours to the aircraft of the sponsoring carrier.

10. Most of Foremost's marketing activities are conducted through retail travel agents, to whom brochures and other advertising literature are sent. The agent, who must hold an IATA appointment for this purpose, issues the airline ticket to the traveller and remits the airfare, less his commission, directly to the carrier. Payment for the ground arrangements is made to Foremost, after the agent deducts ten percent (10%) for his commission.

11. During the years that it has been offering tours to the South Pacific, Foremost has acquired an excellent reputation with retail travel agents throughout the United States and Canada and around the world. The tours offered by Foremost under its trade name "Royal Road Tours"

are known in the travel industry for their quality and exceptional value. To build and further improve its reputation and its goodwill in the travel industry, Foremost has expended considerable time, effort and money in developing its relations with travel agents and sellers of ground facilities (hereinafter called "ground operators").

V

Relevant Market

12. The principal market herein involves the sale in the United States and Canada of flexible tours without fixed itineraries (commonly referred to in the travel industry and hereinafter as "freewheeling tours") to Australia and New Zealand (hereinafter referred to as the "South Pacific"), in conjunction with tour-basing airfares. Freewheeling tours provide a completely flexible itinerary combined with prepaid local transportation facilities and accommodation vouchers, usable at a wide selection of local hotels.

13. Freewheeling tours are distinct from preplanned, fixed-itinerary tours, in which the traveler cannot alter the tour offering with regard to routes, schedules or accommodations at the destination. Another feature which distinguishes freewheeling tours is that they are not limited to holiday travellers. Since this type of tour offers a wide choice of accommodations from among a large number of hotels, and since it places local transportation at the disposal of the traveller, the freewheeling tour is attractive to and is purchased by a substantial number of business travellers as well as holidaymakers.

14. A submarket herein involves the sale in the United States and Canada of custom-itinerary tours to the South Pacific, in conjunction with tour-basing airfares. For this type of tour, the traveller chooses his own itinerary and the tour operator confirms all accommodations in advance.

15. Additional submarkets herein involve the sale in Europe, Southeast Asia and Japan of freewheeling tours to the South Pacific, in conjunction with tour-basing airfares. These submarkets are dependent upon ground arrangements in the South Pacific developed in connection with tours from North America.

16. Plaintiff is without exact data as to the volume of air traffic to the South Pacific; but Plaintiff is informed and believes that the total annual volume for all purposes is approximately 100,000 passngers from the United States and Canada, approximately 45,000 passengers from Southeast Asia and Japan, and approximately 45,000 passengers from Europe. Plaintiff is also without exact data as to the number of freewheeling and custom-itinerary tours to the South Pacific sold in these markets, since no accurate information is available from competing tour operators or airlines.

17. As the result of more than five years of intensive efforts, Foremost's Royal Road Tours have attracted a continually increasing share of the total travel market to the South Pacific. In the year ended March 31, 1974, Foremost sold more than 13,000 tours to persons traveling by air from the United States and Canada to Australia or New Zealand, including approximately five million dollars in land components. Plaintiff is informed and believes that

this volume is at least five times greater than that produced by any other tour operator in these markets.

VI

Relationship of the Parties

18. Through the offer of marketing assistance, Qantas in 1969 encouraged Foremost to expend substantial effort and large sums of money to develop and expand the market for tour programs to the South Pacific area from North America. In response thereto, Foremost conceived and developed the idea of a low-cost freewheeling tour to Australia and New Zealand. This fly/drive tour would offer the traveller a prepaid rental car and a book of vouchers, which would be accepted as payment for room rental at many hotels within each country. The traveller would thus be able to select his own itinerary on a day-to-day basis and be assured of high quality accommodations throughout Australia and New Zealand.

19. Foremost then contracted with hotel and rental car operators in Australia and New Zealand to obtain their facilities for its tours. Foremost was able to negotiate low rates for these ground services, based on the prospect of a high volume business through participation in its freewheeling tour program. Only when these new tour programs had been completely assembled and agreements had been signed with the ground operators, did Foremost present them to Qantas and offer to market the program through Qantas.

20. Foremost developed promotional material, marketing methods, and sales training aids, and thereby greatly

increased public acceptance of, and demand for, freewheeling tours to the South Pacific. Later, Foremost's programs were expanded to include various combinations of motorcoach and air travel as the local transportation components; these became known as the Royal Road Fly/Coach and Fly/Tour programs.

21. As the new programs proved successful, Qantas offered assurances of continued support and required Foremost to establish additional offices in the United States and the South Pacific, to de-emphasize and discontinue certain established tour programs to other parts of the world, and to discontinue participation with other air carriers in tour programs to the South Pacific. Encouraged by Qantas' continued assurances of long-term participation, Foremost completely computerized its procedures for planning individual and group travel itineraries, and installed nationwide toll-free telephone service to facilitate booking procedures. In reliance upon its relationship with Qantas, Foremost developed and began to market, with the assistance of Qantas, a similar series of tours from Southeast Asia, Japan and Europe to Australia and New Zealand. These tours used the same ground facilities and accommodations as the tours from North America.

VII

Count One

22. Plaintiff brings this Count One against Defendant Qantas under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26) to recover treble damages for injuries sustained by Plaintiff arising from Qantas' violation of Section

2 of the Sherman Act (15 U.S.C. 2) and to prevent and to restrain Qantas from continuing to violate said section.

23. Plaintiff herein incorporates by reference the allegations contained in paragraphs 3 through 21 above.

24. Beginning as early as 1972 and continuing to the date of the filing of this complaint, Defendant Qantas has been engaged in a combination and conspiracy to monopolize, in attempts to monopolize, and in actual monopolization of the interstate and foreign commerce described in paragraphs 12 through 17 above.

25. Qantas in bad faith induced Foremost to enter into various agreements, to be proven at trial, wherein Qantas pledged continued marketing support for Foremost's free-wheeling tours through 1977. In reliance upon Qantas' repeated assurances of continued support, Foremost thereafter devoted nearly all of its business efforts to programs being marketed in conjunction with Qantas; and, in attempting to expand and improve its tour programs with Qantas, Foremost neglected other business opportunities and other air carriers.

26. In 1973, Qantas in bad faith initiated negotiations for the purchase of Foremost's business. During the course of the discussions, Qantas agreed upon $5 million as the purchase price for a fifty-one percent (51%) interest in Royal Road tour programs to the South Pacific. In reliance upon the good faith of Qantas and its representatives and in response to their requests, Foremost furnished substantial confidential business information.

27. Qantas further requested and Foremost in its own offices trained approximately fifty (50) Qantas employees in the operation of Foremost's wholesale tour business.

28. These activities were commenced and continued by Qantas in bad faith and with the purpose of gaining access to Foremost's confidential business information and of learning the day-to-day operations of Foremost's business. With the knowledge thus acquired, Qantas intended to and has set out to deprive Foremost of its established wholesale tour business to the South Pacific.

29. In November, 1973, Qantas abruptly informed Foremost that Qantas would begin to operate its own free-wheeling tours to the South Pacific, beginning April 1, 1974, and that it would terminate all dealings with Foremost.

30. Qantas thereafter publicly announced that although its business relations with Foremost had been satisfactory, Qantas would no longer do business with Foremost but that Qantas would continue doing business with other tour operators and wholesalers; Qantas further announced that it expected substantially to duplicate Foremost's volume of tour business to the South Pacific.

31. As the major air carrier serving Australia, and an enterprise owned by the Government of Australia, Qantas enjoys a strategic dominance in air transportation to the South Pacific. Qantas has diverted its vast network of airline services and facilities to the use of its wholesale tour operation called "Qantas Holidays". The availability and use of these resources gives Qantas Holidays sufficient power and strategic dominance to exclude competitors from, and control prices within, the markets for tours to the

South Pacific. In fact, Qantas' conduct surrounding its entrance into the wholesale tour business shows a clear intent on its part to monopolize the relevant markets. This conduct, undertaken by Qantas with the predatory intent and purpose to eliminate Foremost as a competitor in this market, consists of the following unlawful acts, among others.

32. Prior to and since April 1, 1974, Qantas began widely promoting and selling in North America, Southeast Asia and Japan a series of freewheeling tours to the South Pacific which are almost exact duplicates of programs conceived and marketed by Foremost since 1969. In the absence of clear notice to the contrary, prospective travellers have no way of knowing that Qantas' tours are in fact different from Foremost's.

(a) Qantas has distributed promotional materials substantially similar to the materials produced by Foremost.

(b) The tours offered by Qantas are copies of tours offered by Foremost.

(c) Qantas has attempted to obscure the significance of its break in relations with Foremost in order to falsely convey the impression of continuity with Foremost's tour programs. And Qantas is misrepresenting itself to the travel industry and to the public as the developer and proprietor of tours actually conceived, developed and continuously marketed under Foremost's registered trade name "Royal Road Tours".

33. Qantas is selling its freewheeling tours to travel agents and prospective travellers by misrepresenting them as Royal Road Tours.

34. Plaintiff is informed and believes that Qantas is selling its freewheeling tours to the South Pacific below their actual cost, and without any provision for normal overhead or profit.

35. Since April 1, 1974, Qantas had refused to deal with Foremost, contrary to the agreements between the parties. This is being done by Qantas with the intent to eliminate Foremost as a viable competitor in these markets, and to establish Qantas Holidays as the leading wholesale tour operator to the South Pacific. Specifically,

(a) Qantas abruptly ceased dealing with Foremost and began to use Qantas Holidays exclusively for the promotion of freewheeling tours in these markets;

(b) Qantas has refused to provide air transportation to Foremost customers, contrary to Qantas' obligation to provide air transportation to the general public;

(c) Qantas refuses to reserve blocks of seats for Foremost on flights to the South Pacific during the 1974 Christmas season, in order to interfere with Foremost's business, which is dependent upon advance reservations during peak holiday seasons. Such advance blocking of seats had been made for Foremost in the past.

36. Through its position as reservations agent for Air New Zealand in Hawaii, Qantas has misappropriated for itself tour business intended for Foremost through Air New Zealand.

37. Qantas is misappropriating business intended for Foremost by inducing actual and prospective customers of

Foremost to switch to Qantas Holidays tours, disparaging Foremost for that purpose.

38. Plaintiff is informed and believes that Qantas is subwholesaling its freewheeling tours through other tour wholesalers, at prices below their actual cost, for the purpose of saturating the market with Qantas Holidays tours, in order to eliminate Foremost as a competitor and to monopolize the market for freewheeling tours to the South Pacific.

39. Qantas' promotional materials contain numerous deliberate misrepresentations of fact, including car rental free mileage allowance, number of participating hotels, availability of direct flights, and prices of optional extensions. Qantas thereby attempts to mislead prospective tour customers into believing that Qantas Holidays tours are superior to those offered by Foremost.

40. Qantas is generally disparaging Foremost, interfering with Foremost's contracts, attempting to hire key employees of Foremost, and inducing parties with whom Foremost has made contracts to breach those contracts, thereby causing damage to Foremost's business relations and goodwill.

41. Qantas is unlawfully tying the sale of its Qantas Holidays tours to the sale of air transportation by requiring that such tours must be restricted to the services of Qantas Airways.

42. Qantas performed all of the actions described in paragraphs 24 through 41 above, and combined and conspired with others known and unknown to perform said

actions, with full knowledge of their impact on the relevant markets and on Foremost, and with the intent of injuring and eliminating Foremost as a competitor in these markets, for the purpose of monopolizing the tour business to the South Pacific.

43. The overall effect of the aforesaid conduct has been to substantially and unreasonably lessen competition and restrain the interstate and foreign trade described in paragraphs 12 through 17 above.

44. As a further direct and intended result of Qantas' predatory conduct, Foremost has been injured and is in immediate and substantial danger of being eliminated as an effective competitor in these markets, and of losing its business entirely. Should Qantas continue to engage in this conduct, Foremost will continue to be injured in an amount as yet undetermined, but believed to be not less than TWENTY MILLION DOLLARS ($20,000,000).

VIII

COUNT TWO

45. Plaintiff brings this Count Two against Defendant Qantas under Sections 4 and 16 of the Clayton Act (15 U.S.C. 15, 26) to recover treble damages for injuries sustained by Plaintiff arising from Qantas' violation of Section 1 of the Sherman Act (15 U.S.C. 1) and to prevent and to restrain Qantas from continuing to violate said section.

46. Plaintiff herein incorporates by reference the allegations contained in paragraphs 3 through 21 above.

47. Beginning in 1973, and continuing to the date of the filing of the complaint, Qantas and its co-conspirator, CP Air (CP) have been engaged in an unlawful combination and conspiracy in unreasonable restraint of the interstate and foreign trade described in paragraphs 12 through 17 above. Said combination and conspiracy consists of a continuing agreement, understanding and concert of action between Qantas and its co-conspirator, the substantial terms, purposes and intent of which are as follows:

(a) Qantas unlawfully induced CP to terminate its prior relationships with Foremost and to exclude Foremost from the tour markets served by CP and Qantas. Qantas and CP further agreed that CP would promote and sell exclusively Qantas Holidays freewheeling tours in these markets.

(b) Qantas and CP have unlawfully agreed to promote and sell Qantas Holidays tours at prices fixed by Qantas. Plaintiff is informed and believes that both Qantas and CP are selling these tours below their actual costs, and without provision for normal overhead or profit.

(c) Qantas and CP have unlawfully agreed not to compete for tour business in markets served by them jointly, and to divide and allocate between themselves the North American market for freewheeling tours to the South Pacific.

(d) Qantas and CP have unlawfully agreed to tie the sale of Qantas Holidays tours to the sale of air transportation by requiring that such tours must be restricted to the services of Qantas and CP Air.

48. During the period of time covered by this complaint, and for the purpose of formulating and effecting the aforesaid combination and conspiracy, Qantas in addition performed each of the acts alleged in paragraphs 24 through 41 above, which are herein incorporated by reference.

49. Qantas performed all of the acts described in paragraphs 47 and 48 with full knowledge of their impact on the relevant markets and on Foremost, and with the intent of injuring and eliminating Foremost as a competitor in these markets.

50. Qantas and CP are the only airlines operating direct flights from Canada to Sydney, Australia. The overall effect of the aforesaid combination and conspiracy has been to substantially and unreasonably lessen competition and restrain the interstate and foreign trade described in paragraphs 12 through 17 above.

51. As a further direct and intended result of the aforesaid combination and conspiracy, Foremost has been injured and is in immediate and substantial danger of being eliminated as an effective competitor in these markets, and of losing its business entirely. Should Qantas continue to engage in this combination and conspiracy, Foremost will continue to be injured in an amount as yet undetermined, but believed to be not less than TWENTY MILLION DOLLARS ($20,000,000.00).

IX

PRAYER

52. WHEREFORE, Plaintiff prays that the court adjudge and decree as follows:

Complaint Filed in the District Court

(a) That Qantas has engaged in a combination and conspiracy to monopolize, in an attempt to monopolize, and in actual monopolization of interstate and foreign commerce in violation of Section 2 of the Sherman Act;

(b) That Qantas has entered into a combination and conspiracy in restrain of interstate and foreign trade and commerce in violation of Section 1 of the Sherman Act;

(c) That Qantas be restrained and permanently enjoined from acting in any manner whatsoever, directly or indirectly, as a wholesale tour operator and from acting in any manner, directly or indirectly, to produce or operate tours to Australia or New Zealand in competition with Plaintiff and other legitimate wholesale tour operators, pursuant to Section 16 of the Clayton Act;

(d) That Plaintiff have judgment against Qantas in the sum of TWENTY MILLION DOLLARS ($20,000,000.00), together with any other money damages that may occur by reason of any continuing injury in the future, and that this amount be trebled, as required by Section 4 of the Clayton Act;

(e) That Plaintiff be awarded reasonable attorneys' fees and recover its costs of litigation, as provided by Section 4 of the Clayton Act; and

(f) That Plaintiff have such other and further relief as the court may deem just and proper.

DATED: May 30, 1974.

/s/ KEVIN HUGHES
KEVIN HUGHES
Attorney for Plaintiff

Complaint Filed in the District Court

RONALD C. FENWICK, being duly sworn, deposes and says:

That he is president of Foremost International Tours, Plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same are true of his own knowledge, except as to those matters that are therein stated on Plaintiff's information and belief, and, as to those matters, that he believes them to be true.

/s/ RONALD C. FENWICK, President
RONALD C. FENWICK

INDIVIDUAL

STATE OF HAWAII,
CITY AND COUNTY OF HONOLULU, *ss.:*

On this 30th day of May, ..., A.D. 1974, before me personally appeared RONALD C. FENWICK to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as his free act and deed.

/s/ ELEANI H. FLOYD
Notary Public, First Judicial Circuit,
State of Hawaii.
My Commission Expires October 29, 1977

[SEAL]

Third Party Complaint Filed With The Civil Aeronautics Board

ALEXANDER ANOLIK
KEVIN HUGHES
SUZANNE McDONNELL
1255 Post Street, Suite 711
San Francisco, California 94109
Telephone: (415) 776-3800

Attorneys for Complainant

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

Docket ———

FOREMOST INTERNATIONAL TOURS, INC.,

Complainant,

VS.

QANTAS AIRWAYS LIMITED,

Respondent.

THIRD-PARTY COMPLAINT OF
FOREMOST INTERNATIONAL TOURS, INC.

Communications with respect to this document should be sent to:

Third Party Complaint Filed With
The Civil Aeronautics Board

ALEXANDER ANOLIK
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Telephone: (415) 776-3800
Attorneys for Complainant
Foremost International Tours, Inc.
1600 Kapiolani Boulevard
Honolulu, Hawaii 96814

Dated: March 14, 1975.

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BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D.C.

Docket ———

FOREMOST INTERNATIONAL TOURS, INC.,

Complainant,

VS.

QANTAS AIRWAYS LIMITED,

Respondent.

Third Party Complaint Filed With
The Civil Aeronautics Board

Foremost International Tours, Inc., complainant (hereinafter "Foremost"), brings this complaint against Qantas Airways Limited, respondent (hereinafter "Qantas"), and alleges as follows:

FIRST CAUSE OF ACTION

I

This complaint is filed pursuant to Sections 402, 403, 404, 411 and 1002 of the Federal Aviation Act of 1958, as amended (hereinafter referred to as "Act"), and Rules 201 and 204(a) of the Board's Rules of Practice.

II

Complainant Foremost International Tours, Inc., is, and at all times herein mentioned was, a corporation organized and existing under the laws of the State of Hawaii, with its principal offices located in Honolulu, Hawaii. At all times mentioned in this complaint, Foremost has been engaged in the business of a wholesale tour operator, principally engaged in the production and sale of inclusive tours to Australia and New Zealand.

III

Respondent Qantas Airways Limited, is, and at all times herein mentioned was, a foreign air carrier within the meaning of Section 101(19) of the Act, and a holder of a foreign air carrier permit authorizing it to engage in foreign air transportation, issued to it by the Board pursuant to Section 402 of the Act.

Third Party Complaint Filed With
The Civil Aeronautics Board

IV

In 1969, Foremost entered into a relationship with Qantas, whereby Qantas became the sponsoring carrier of a series of inclusive tour programs created and operated by Foremost. These tour programs, offered to the public as Foremost Royal Road Tours, were and are freewheeling packages offering the traveler a combination of hotel accommodation and ground transportation, thereby allowing the traveler to develop his own itinerary. In furtherance of the development of these tour programs, Foremost entered into contractual relations with suppliers of the various component parts of the tours.

V

Relying on assurances of continued support from Qantas, Foremost developed promotional material, marketing methods, sales techniques and sales training aids, thereby greatly increasing public acceptance of, and demand for, its Royal Road freewheeling tours to the South Pacific. Foremost is informed and believes that its Royal Road tour series achieved a greater volume in the sale of inclusive tours to the South Pacific than did tours offered by any other tour operator in the history of travel to the region. In order to establish itself as the exclusive sponsoring carrier of Foremost Tours, Qantas required that Foremost enter into an agreement designating Qantas as the exclusive sponsoring carrier of Foremost Royal Road Tours, and Qantas induced Foremost to accept payments in connection with the said agreement, in the sum of $750,000 per annum, payable monthly.

Third Party Complaint Filed With
The Civil Aeronautics Board

VI

On November 9, 1973, Qantas abruptly informed Foremost that Qantas would soon thereafter begin to produce and operate its own series of freewheeling inclusive tours to the South Pacific, through its own Qantas tour department, and that, beginning April 1, 1974, it would terminate all dealings with Foremost, in breach of its various agreements with Foremost.

VII

Thereafter, on April 1, 1974, Qantas commenced to sell an inclusive tour series through its Qantas Holidays tour department, an unincorporated department of Qantas Airways Limited. The said tour series is produced, packaged, marketed and operated by Qantas Airways Limited.

VIII

By operating the aforementioned tour business through its own tour department, Qantas has been, and is, engaged in unauthorized air commerce and foreign air commerce within the meaning of Sections 101(4) and 101(20) of the Act, and is thereby in violation of Section 402 of the Act, which prescribes the terms and limitations of its foreign air carrier permit to engage in foreign air transportation, and is acting contrary to the public interest.

IX

Qantas has held out to the public and has performed such unauthorized activities in air commerce and foreign air commerce, as services in connection with air transportation, under a name other than the name in which its

Third Party Complaint Filed With
The Civil Aeronautics Board

operating authorization is issued, to-wit: "Qantas Holidays," the use of which name, on information and belief, has not been authorized by the Board, in violation of Part 215.2 of the Board's Economic Regulations, and contrary to the public interest.

SECOND CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action.

II

Complainant is informed and believes that at no time prior to April 1, 1974, or subsequent to that date, has Qantas filed with the Board a tariff specifically describing its tour operations and other unauthorized activities in air commerce and foreign air commerce as services offered in connection with air transportation. Instead, Qantas filed a tariff publication which failed to describe the aforementioned services offered in connection with air transportation. On information and belief, the Board failed to make the determination required by Part 221.180 of the Board's Economic Regulations, that the aforementioned deficient tariff publication is consistent with Section 403 of the Act and with the regulations in Part 221 of the Board's Economic Regulations.

III

The filing by Qantas of the aforementioned deficient tariff has resulted and will continue to result in public

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The Civil Aeronautics Board

uncertainty with regard to the services offered by Qantas and Board authorization of those services, and has provided the Board with insufficient data to make a determination that the aforementioned services are consistent with the requirements of the Act and with the public interest.

IV

By reason of the foregoing, the tariff publication filed by Qantas is in violation of Section 403(a) of the Act and Parts 221.3(a), 221.38(a) and 221.53 of the Board's Economic Regulations, and is not in the public interest.

THIRD CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, and in Paragraphs II through IV of its Second Cause of Action.

II

With respect to the aforementioned unauthorized activities in air commerce and foreign air commerce offered by Qantas as services in connection with air transportation, Qantas has failed to establish, observe and enforce just and reasonable charges and just and reasonable classifications, rules, regulations and practices relating to foreign air transportation, all in violation of Section 404(a)(2) of the Act and contrary to the public interest.

Third Party Complaint Filed With
The Civil Aeronautics Board

FOURTH CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, Paragraphs II through IV of its Second Cause of Action, and Paragraph II of its Third Cause of Action.

II

Commencing April 1, 1974, and continuing up to the date of the filing of this complaint, Qantas has offered for sale and has sold Qantas tours at prices less than their actual cost to Qantas.

III

Qantas has incurred various costs, direct and indirect in an amount as yet undetermined, in connection with its unauthorized activities in air commerce and foreign air commerce, and with the sale of each inclusive tour offered therewith. No part of the costs of said unauthorized business operations in air commerce and foreign air commerce, whether direct or indirect, may be attributed to Qantas' authorized operations in air transportation. Revenues from the sale of the aforementioned tours are insufficient to allow Qantas to recover the costs of operating its unauthorized tour business. Revenues from the sale of air transportation are thereby diverted to cover the cost, direct and indirect, of each said tour, in an amount as yet undetermined.

Third Party Complaint Filed With
The Civil Aeronautics Board

IV

On May 30, 1974, Foremost filed in the United States District Court for the District of Hawaii, a complaint alleging various antitrust violations against Qantas, and praying for damages and for injunctive relief. An evidentiary hearing was had with respect to Foremost's motion for a preliminary injunction, and in consequence of that hearing, the District Court found that Foremost "made an unrebutted prima facie showing that Qantas is marketing its tours below cost." By way of example, the District Court found that a Qantas 14-day group inclusive tour to Australia, at $899 was sold for 57 cents less than the cost to Qantas of the component parts of the tour, at the actual and then prevailing rate of exchange. The said cost deficit, and similar deficits on the other tours in the Qantas series, were incurred by Qantas with no provision made for recovery of any other cost, direct or indirect, incurred by Qantas in connection with its tour business operations. The Decision of the District Court is attached hereto as Exhibit "A".

V

In consequence of the aforesaid findings, the District Court, on July 26, 1974, issued a preliminary injunction requiring that Qantas withdraw its tours from sale until such time as the court should approve revised prices for the said tours. Tentative approval was later given to a schedule of such revised prices, pending the results of a court-ordered independent audit scheduled for June, 1975.

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The Civil Aeronautics Board

VI

Foremost is informed and believes that any Qantas tour now marketed at the aforesaid court-directed revised prices which is not being sold at a price below cost would be sold below cost but for the order of the District Court restraining Qantas from thus selling below cost, and that Qantas will resume and continue its practice of selling said tours at prices below cost at such time as it may be relieved from the order of the District Court.

VII

Since inclusive tours are offered for sale at a package price which includes air transportation, the air fare portion of each such tour is discounted by Qantas in an amount necessary to recover the cost deficit on each tour sold, in violation of Section 403(b) of the Act and Part 221.3(b) of the Board's Economic Regulations, and contrary to the public interest.

FIFTH CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, Paragraphs II through IV of its Second Cause of Action, Paragraph II of its Third Cause of Action, and Paragraphs II through VII of its Fourth Cause of Action.

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The Civil Aeronautics Board

II

By making the aforementioned discounts available only to passengers traveling on Qantas tours, Qantas has given and caused to be given an undue and unreasonable preference and advantage to the aforesaid passengers in foreign air transportation traveling on Qantas tours, and has subjected passengers in foreign air transportation not traveling on Qantas tours to unjust discrimination and undue and unreasonable prejudice and disadvantage, all in violation of Section 404(b) of Act and Parts 223.2 and 223.8 of the Board's Economic Regulations, and contrary to the public interest.

SIXTH CAUSE OF ACTION

I

Foremost repleads, realleges and incorporates herein by reference each and every allegation contained in Paragraphs I through IX of its First Cause of Action, Paragraphs II through IV of its Second Cause of Action, Paragraph II of its Third Cause of Action, Paragraphs II through VII of its Fourth Cause of Action, and Paragraph II of its Fifth Cause of Action.

II

Beginning as early as 1972 and continuing to the date of the filing of this complaint, Qantas has been engaged in unfair and deceptive practices and unfair methods of competition in air transportation and the sale thereof, including those hereinabove described.

Third Party Complaint Filed With
The Civil Aeronautics Board

III

At various times during the course of its business relationship with Foremost, Qantas in bad faith induced Foremost to enter into various agreements, written and oral, wherein Qantas pledged continued sponsorship and support for Foremost's freewheeling inclusive tours at least through 1977. In reliance upon Qantas' repeated assurances of continued support, Foremost thereafter devoted nearly all of its business efforts tour programs marketed in conjunction with Qantas; and in attempting to expand and improve its tour programs with Qantas, Foremost neglected other business opportunities and opportunities with other air carriers.

IV

In 1973, Qantas in bad faith initiated negotiations for the purchase of Foremost's business. During the course of the discussions, Qantas agreed upon $5,000,000 as the purchase price for a 51 per cent interest in Foremost's Royal Road tour programs to the South Pacific. In reliance upon the good faith of Qantas and its representatives and in response to their requests, Foremost furnished substantial business information to Qantas.

V

In response to requests from Qantas, Foremost trained in its own offices approximately 50 Qantas employees in the operation of Foremost's wholesale tour business.

VI

These activities were commenced and continued by Qantas in bad faith and with the purpose of gaining access

to Foremost's confidential business information and of learning the day-to-day operations of Foremost's business. With the knowledge thus acquired, Qantas intended to and has set out to deprive Foremost of its established wholesale tour business to the South Pacific, and to acquire for itself a dominant share of that business.

VII

As hereinabove alleged, on November 9, 1973, Qantas abruptly informed Foremost that Qantas would soon thereafter begin to produce and operate its own series of freewheeling inclusive tours to the South Pacific, through its own Qantas tour department, and that, beginning April 1, 1974, it would terminate all dealings with Foremost, in breach of its various agreements with Foremost.

VIII

Qantas thereafter publicly announced that although its business relations with Foremost had been satisfactory, Qantas would no longer do business with Foremost but that Qantas would continue doing business with other tour operators and wholesalers; Qantas further announced that it expected substantially to duplicate Foremost's volume of tour business to the South Pacific.

IX

As hereinabove alleged, on April 1, 1974, Qantas commenced to sell through its Qantas Holidays tour department an inclusive tour series produced, packaged, marketed and operated by Qantas.

X

Prior to and since April 1, 1974, Qantas has widely promoted and sold a series of freewheeling inclusive tours to the South Pacific which are virtual duplicates of tours conceived and marketed by Foremost since 1969. In the absence of clear notice to the contrary, prospective travelers have no way of knowing that Qantas' tours are in fact different from Foremost's, since:

(a) Qantas has distributed promotional materials which are substantially identical to the materials previously produced by Foremost;

(b) The tours offered by Qantas are copies of tours offered by Foremost;

(c) Qantas has attempted to obscure the significance of its break in relations with Foremost in order falsely to convey the impression of continuity with Foremost's tour programs; Qantas has further misrepresented itself to the travel industry and to the public as the developer and proprietor of tours actually conceived, developed and continuously marketed under Foremost's registered trade name "Royal Road Tours".

XI

Qantas has sold its freewheeling tours to travel agents and prospective travelers by misrepresenting them as Royal Road Tours.

XII

Qantas has sold and is selling its freewheeling inclusive tours to the South Pacific at prices below their cost, there-

by discounting each inclusive tour ticket for foreign air transportation in an amount necessary to recover the resulting cost deficit on the land portion of the tour package.

XIII

Since April 1, 1974, Qantas has refused to deal with Foremost, and to carry out the terms of its agreements with Foremost by removing itself from the sponsorship of Foremost tours and using Qantas Holidays exclusively for the development and promotion of freewheeling inclusive tours to the South Pacific; by refusing to provide air transportation to Foremost's customers, contrary to its obligation to provide air transportation to the general public; by refusing to reserve blocks of seats for Foremost on flights to the South Pacific during the 1973 Christmas season, a peak business period, in order to interfere with Foremost's business, which is dependent upon advance reservations during peak holiday seasons, and contrary to its previous practice of routinely providing advance blocking of seats for Foremost in the past.

XIV

Through its position as reservations agent for Air New Zealand in Hawaii, Qantas has misappropriated for itself tour business intended for Foremost through Air New Zealand.

XV

Qantas has misappropriated tour business intended for Foremost by inducing actual and prospective customers of Foremost to switch to Qantas tours, disparaging Foremost for that purpose; Foremost is informed and believes that

but for the order of the District Court enjoining Qantas from engaging in the aforesaid switching of business from Foremost to itself, Qantas would resume and continue the practice.

XVI

Qantas has offered to and has engaged in the practice of sub-wholesaling its freewheeling inclusive tours through other air carriers and tour wholesalers, at prices below their actual cost to Qantas, for the purpose of saturating the market with Qantas tours, and to deprive Foremost of additional outlets for its business.

XVII

To induce public acceptance of Qantas tour programs by means of false, misleading, and deceptive practices, and to divert business from Foremost, Qantas widely advertised and promoted a 10-day group inclusive tour to Australia at a price of $805, the lowest price quoted for any such tour on the market. The District Court found that Qantas' attempts to substantiate its costs on the $805 tour were false, that the hotel rate upon which the tour price as based, "was never intended to be used or sold by either Qantas or the hotel," and that "Qantas never sold any such tour." The District Court further found that the said tour was actually designed as a "bait and switch" sales technique.

XVIII

Promotional materials and advertising distributed by Qantas for the purpose of marketing its tours have contained numerous deliberate misrepresentaions of fact, re-

lating to free mileage allowance on rental cars, number of hotels participating in Qantas tour programs, availability of direct flights on Qantas, and prices of optional tour extensions; Qantas thereby has attempted to mislead prospective tour customers into falsely believing that Qantas tours are superior to those offered by Foremost.

XIX

Qantas is generally disparaging Foremost, interfering with Foremost's contracts, attempting to hire key employees of Foremost, and inducing parties with whom Foremost has made contracts to breach those contracts, thereby causing damage to Foremost's business relations and good will.

XX

As the major air carrier serving Australia, and as an enterprise owned by the government of Australia, Qantas enjoys a strategic dominance in foreign air transportation to the South Pacific; Qantas has diverted its vast network of airline services and facilities to the use of its wholesale tour business; by placing those resources at the disposal of its tour business, Qantas can achieve sufficient power to exclude competitors from, and to control prices within, the market for tours to the South Pacific, and thereby to compete unfairly with Foremost by virtue of its official authorization to engage in foreign air transportation as a foreign air carrier.

XXI

Qantas has engaged in all of the unfair and deceptive practices and unfair methods of competition hereinabove

described in Paragraphs I through XX of this cause of action with full knowledge of their destructive impact on Foremost, and with the intent of injuring and eliminating Foremost as a competitor in the wholesale tour business, for the purpose of monopolizing the tour business to the South Pacific and controlling prices therein, all in contravention of the public interest in free competition and in violation of Section 411 of the Act.

WHEREFORE, Foremost respectfully requests that the Board take the following action:

1. Issue an order directing Qantas to cease and desist from engaging in the business of tour operator, from engaging in the above-mentioned unauthorized activities in air commerce and foreign air commerce, and from engaging in the above-mentioned unfair and deceptive practices and unfair methods of competition;

2. Take such action as is considered necessary to prevent Qantas from further violating the Act pending the issuance of the foregoing cease and desist order; and

3. Grant such other and further relief as to the Board may seem appropriate.

Dated: March 14, 1975.

Third Party Complaint Filed With
The Civil Aeronautics Board

Respectfully submitted,

FOREMOST INTERNATIONAL TOURS, INC.,
Complainant

/s/ RONALD C. FENWICK
Ronald C. Fenwick, *President*

/s/ PATRICK J. CORBETT
Patrick J. Corbett
Secretary-Treasurer
with power of attorney for Foremost International Tours, Inc.
1600 Kapiolani Boulevard
Honolulu, Hawaii 96814

ALEXANDER ANOLIK
KEVIN HUGHES
SUZANNE MCDONNELL

By KEVIN HUGHES
Kevin Hughes
Attorneys for Complainant
Foremost International
Tours, Inc.

Third Party Complaint Filed With
The Civil Aeronautics Board

VERIFICATION

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO, *ss.:*

RONALD C. FENWICK, being duly sworn, deposes and says that he has read the foregoing Third-Party Complaint of Foremost International Tours, Inc., and the exhibit attached thereto, that he knows the contents thereof, that the matters and things stated therein are true of his own knowledge, except that, with respect to those matters stated therein on information and belief, he believes them to be true.

By /s/ RONALD C. FENWICK
Ronald C. Fenwick, President

By Patrick J. Corbett,
Secretary-Treasurer,
With power of attorney
Foremost International Tours, Inc.
1600 Kapiolani Boulevard
Honolulu, Hawaii 96814

Subscribed and sworn to before
me, this 17th day of March, 1975.

/s/ CECELIA ANOLIK
Notary Public
For the State of California,
City and County of San Francisco
My Commission Expires: May 31, 1976

[SEAL]

Petition for Enforcement, *Foremost International Tours, Inc.* v. *Qantas Airways Limited*, Enforcement Proceeding, Docket 27631 Before the Civil Aeronautics Board

BEFORE THE

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

Docket 27631

Complaint of

FOREMOST INTERNATIONAL TOURS, INC.

against

QANTAS AIRWAYS LIMITED

Enforcement Proceeding

PETITION FOR ENFORCEMENT*

It is the opinion of the undersigned Director of the Bureau of Enforcement that there are reasonable grounds to believe that provisions of the Federal Aviation Act of 1958 (the Act) and rules, regulations, orders, limitations, and other conditions established pursuant thereto, as iden-

* The docketing of this petition for enforcement does not constitute Board action. This petition has been docketed with the Board by the Director of the Bureau of Enforcement, in accordance with the provisions of 14 C.F.R. 302.206, in order to institute an economic enforcement proceeding before the Board for the purpose of obtaining a Board determination of whether any violations have been committed, and whether the relief requested should be granted.

tified below, have been and are being violated by virtue of the things done or omitted to be done by Qantas Airways Limited, as described below; that there have been no efforts to satisfy the Third-party Complaint in this docket; and that investigation of the alleged violations as described in those parts of the Third-party Complaint incorporated herein by reference, is in the public interest. Therefore, in accordance with Rule 206 of the Board's Rules of Practice (14 C.F.R. Part 302), the undersigned Director of the Bureau of Enforcement is instituting this economic enforcement proceeding by causing the docketing of this Petition for Enforcement.

This Petition for Enforcement hereby incorporates by reference the following parts of the Third-party Complaint previously filed in this docket by Foremost International Tours, Inc., against Qantas Airways Limited:

(1) The Fourth, Fifth, and Sixth Causes of Action, at pages 5-14 of the Complaint, except paragraph XX of the Sixth Cause of Action; and

(2) The allegations contained in the First Cause of Action, paragraphs I through VII, at pages 1-3 of the Complaint, but no other allegations contained in the First, Second, or Third Causes of Action.[1]

[1] In accordance with Rule 205 (14 C.F.R. 302.205) a letter is being sent to Foremost, with a copy to Qantas, advising that no enforcement proceeding will be instituted with respect to the First, Second, and Third Causes of Action in the Third-Party Complaint, as well as paragraph XX of the Sixth Cause of Action. The reasons for this action, its effects, and procedures for Board review thereof, are contained in that letter.

Petition for Enforcement, Foremost International Tours, Inc. v. Qantas Airways Limited, Enforcement Proceeding, Docket 27631 Before the Civil Aeronautics Board

This Petition for Enforcement does not incorporate by reference the requests for relief contained in Foremost's Third-party Complaint, but rather requests that if Qantas be found, because of its activities as alleged herein by reference, to have failed to comply with Sections 403(b) and 404(b) of the Act (49 U.S.C. 1373(b) and 1374(b)), that Qantas be ordered to comply therewith; and that if Qantas be found, because of its activities as alleged herein by reference, to have engaged in unfair and deceptive practices and unfair methods of competition, within the meaning of Section 411 of the Act (49 U.S.C. 1381), that Qantas be ordered to cease and desist from such practices and methods of competition.

The docketing of this Petition for Enforcement is not to be construed as limiting the authority of the Board to institute or conduct any investigation or inquiry within its jurisdiction in any other manner or according to any other procedure which it may deem necessary or proper.[2]

This Petition for Enforcement is being formally served on Qantas Airways Limited and Foremost International Tours, Inc.

/s/ THOMAS F. MCBRIDE
Thomas F. McBride
Director
Bureau of Enforcement

December 15, 1975
Washington, D. C.

[2] See Rule 206 of the Board's Rules of Practice (14 C.F.R. Part 302).

Petition for Enforcement, Foremost International Tours, Inc. v. Qantas Airways Limited, Enforcement Proceeding, Docket 27631 Before the Civil Aeronautics Board

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 1975, I served the attached Petition for Enforcement upon the parties in this proceeding by mailing to each of them a copy of said Petition in a properly addressed, franked envelope, certified mail.

/s/ SHARON ANN MANEVAL
Sharon Ann Maneval

December 15, 1975
Washington, D. C.

The Letter of Notice of Dismissal, In Part, of the Civil Aeronautics Board December 15, 1975

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

December 15, 1975

AIRMAIL

Alexander Anolik, Esq.
Suzanne McDonnell, Esq.
693 Sutter Street-Sixth Floor
San Francisco, California 94102

B-52/75-0362

Re: Third-party Complaint of Foremost International Tours, Inc., against Qantas Airways Limited, Docket 27631
NOTICE OF DISMISSAL, IN PART

Dear Mr. Anolik:

This is to advise you, in accordance with Rule 205(a) of the Board's Rules of Practice (14 C.F.R. Part 302),[1] that the following actions are being taken with respect to the above-referenced Third-party Complaint:

(1) The Director of the Bureau of Enforcement (the Bureau) is docketing a Petition for Enforcement (thereby instituting an economic enforcement proceeding before the Board), which incorporates by reference (1) those allegations contained in the Fourth, Fifth, and Sixth Causes of Action in the Foremost Third-party Complaint (alleging violations of Sections 403(b) and 404(b) of the Act and

[1] See also, Section 1002(a) of the Federal Aviation Act of 1958 (the Act) (49 U.S.C. 1482).

unfair and deceptive practices and unfair methods of competition within the meaning of Section 411 of the Act), except for paragraph XX of the Sixth Cause of Action, and (2) the allegations in paragraphs I through VII of the First Cause of Action.[2] Foremost is being served with a copy of this Petition for Enforcement, and it will be a party to this enforcement proceeding.[3]

(2) Notice is being given to Foremost, by this letter, that no enforcement proceeding will be instituted with respect to the First, Second, and Third Causes of Action, and paragraph XX of the Sixth Cause of Action (alleging violations of Sections 402(a), 403(a), and 404(a) of the Act, and Parts 215 and 221 of the Board's Regulations), except as indicated above. The reasons for this decision are set forth herein.

SUMMARY OF FILINGS

The Foremost Third-party Complaint alleges, in general, that by operating an "in-house" tour operator department,[4] Qantas is engaging in unauthorized foreign air transporta-

[2] The relief requested in the Petition for Enforcement is not the same as that in the Foremost Third-party Complaint.

[3] See Rule 210 of the Board's Rules of Practice (14 C.F.R. Part 302).

[4] A "tour operator" can be defined as a business which prepares, operates, and markets on a "wholesale" basis to travel agents, inclusive (package) tours for air transportation plus ground arrangements. An "in-house" tour operation can be defined as a tour operator business conducted by a department or office of an air carrier or foreign air carrier, and not through a separate corporate or business structure. (These definitions are not the same as, and should not be confused with, the term "tour operator" as used in several Parts of the Board's Regulations. Also, "inclusive tours", as used in this letter, should not be confused with "inclusive tour charters" as used in Part 378 of the Board's Regulations).

tion in violation of Section 402(a) of the Act; that Qantas is violating the name usage restrictions of Part 215 of the Board's Regulations; that Qantas has failed to file proper tariffs concerning its tour operations, in violation of Section 403(a) of the Act and Part 221 of the Regulations; and that Qantas has failed to comply with Section 404(a) of the Act, concerning just and reasonable charges and classifications and practices.

The Foremost Third-party Complaint also alleges that Qantas is violating Section 403(b) of the Act and Section 221.3(b) of the Regulations (by selling inclusive tours at package prices which fail to fully cover the costs of the tours), and Section 404(b) of the Act and Sections 223.2 and 223.8 of the Regulations (by giving an unfair preference to passengers on its tours and subjecting passengers not on its tours to unjust discrimination and unreasonable disadvantage), and that Qantas is engaging in unfair practices and methods of competition within the meaning of Section 411 of the Act (because of the specific practices cited by Foremost). Those charges are incorporated in the Petition for Enforcement referred to above, and need not be discussed here.

Foremost asks the Board to direct Qantas to cease and desist from engaging in (1) the business of a tour operator, (2) the described unauthorized activities, and (3) the described unfair and deceptive practices and unfair methods of competition. Foremost also asks the Board to take necessary interim action and to grant other appropriate relief.

Qantas filed a Preliminary Statement and Answer to Foremost's Third-party Complaint. In its preliminary statement, Qantas requests the Board to (1) accept jurisdiction of the matters in dispute between Foremost and

Qantas, (2) approve the entry of Qantas into the inclusive tour market and its sale of such tours at prices which conform with IATA resolutions and Qantas' tariffs, and (3) promulgate appropriate regulations to uniformly regulate air carriers and foreign air carriers engaged in inclusive tours.

In its Answer to the Complaint, Qantas denies the allegations of its violations of the Act and Regulations. Qantas requests the Board to (1) exercise its jurisdiction over the matters alleged in the Third-party Complaint, (2) order that Qantas and other foreign air carriers are authorized to sell inclusive tours through their own tour departments or subsidiaries, (3) order that it is in the public interest for foreign air carriers to sell inclusive tours at prices which conform to IATA resolutions and include costs charged to the carriers by suppliers of land components of the tours, (4) define those costs which the Board determines should be included in the sales price of inclusive tours, (5) initiate an investigation of the inclusive tour business conducted by air carriers and foreign air carriers, and establish regulations with respect to this subject, and (6) deny the relief requested by Foremost.

BACKGROUND

There is currently pending in the United States District Court for the District of Hawaii an antitrust action by Foremost against Qantas.[5] The District Court judge presiding over that case issued a decision on certain preliminary matters,[6] in which he concluded that,

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[5] Civil No. 74-116.

[6] 379 F.Supp. 88 (D. Haw. 1974), aff'd, No. 74-2463, U.S. Court of Appeals for the Ninth Circuit, October 22, 1975.

(1) the challenged actions of Qantas are not immunized from antitrust attack by virtue of Section 414 of the Act;

(2) the entry of Qantas into the inclusive tour business and its below cost pricing practice, switching of tours, as well as the other charges of anticompetitive activity —terminating a business relationship, obtaining confidential information, imitating Foremost's brochures, boycotting, tyings, and dividing the market—are within the initial jurisdiction of the CAB; and

(3) enjoined Qantas from selling its tours at prices which do not include all of the direct and indirect costs of the tours, and from shifting to itself business intended for Foremost.

Foremost then filed this Third-party Complaint with the Board, in order to bring to the attention of the Board the matters which the District Court judge referred here. The court retained jurisdiction over the alleged antitrust violations, but stayed further proceedings pending review, consideration, determination, and findings by the Board on the matters referred. This was said by the judge, though, not to indicate any intent to restrict the scope of the Board's investigation and rulings on any of the issues presented by Foremost's complaints.

Airline "In-House" Tour Operator Activities

The basic issue raised by the Foremost Third-party Complaint, as well as the related antitrust action in Hawaii, is whether air carriers and foreign air carriers should be prohibited from engaging in tour operator activities "in-house",

whether they should be limited in some degree from such activities, or whether they should be permitted to compete unrestricted with "independent" tour operators. The Board may be able to assist the District Court hearing the antitrust action, and the tour operator business and other interested persons, by resolving this question, but the Bureau does not believe that an enforcement proceeding is the appropriate vehicle for this task.

While it is possible that the conduct of "in-house" tour operator businesses by air carriers and foreign air carriers could constitute a section 411 practice or method of competition, the Bureau does not have sufficient evidence at this time to believe that "in-house" tour operations are violative of that or any other section of the Act or Board Regulations. Therefore, no enforcement proceeding will be instituted with regard to those parts of Foremost's Third-party Complaint which deals with this issue.

However, a rulemaking proceeding at the Board would be a very good place for Foremost or other interested persons to attempt to resolve the "in-house" issue. Any interested person, including Foremost or Qantas, may petition the Board for the issuance of a regulation to specifically permit, prohibit, or permit subject to limitations, air carriers and/or foreign air carriers from conducting tour operator activities "in-house" or through any other form of business structure. Such petitions for rulemaking are specifically authorized and governed by the provisions of Rule 38 of the Board's Rules of Practice (14 C.F.R. 302.38). The action taken in this letter does not in any way limit the right of anyone to petition for rulemaking on the subject of airline "in-house" tour operations, and may be considered an invitation and encouragement to do so.

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It should also be pointed out that persons interested in this subject, and in particular those who will be filing petitions for rulemaking by the Board on this subject, may also petition the Board to reexamine the previous approval of IATA Resolution 810d—"Inclusive Tours Initiated by Members", which has sometimes been cited as an expression of the Board's views on "in-house" tour operations. This resolution was first approved by the Board in 1952, but it does not appear that the advantages and disadvantages of airline "in-house" tour departments were considered in detail at that time or since.[7] Foremost or any other person may consider it useful to seek to have the Board conduct such an examination of IATA Resolution 810d in conjunction with a proposed rulemaking proceeding on the "in-house" issue, and to request the Board to reaffirm its approval, to disapprove, or to have additional conditions attached to the approval of that resolution. Again, the action taken in this letter is not a limitation, and may be read as an invitation and encouragement, for any person to file a petition or motion requesting the Board to reexamine the approval of IATA Resolution 810d in conjunction with any proposed rulemaking proceeding on the "in-house" tour operator issue.

OTHER ALLEGED VIOLATIONS

Foremost also alleges that Qantas is violating Section 215.2 of the Board's Regulations by holding out to the

[7] See Order E-6695, issued August 14, 1952, approving, among other agreements, IATA Resolution 810d under the designation Agreement CAB 6262-R-101. Also see Order E-24886, issued March 23, 1967, which denied a petition for Board review of staff action in approving certain amendments to IATA Resolution 810d.

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public and performing air transportation services using a name other than that in which its operating authorization is issued or which name has been authorized by the Board. Foremost also alleges that Qantas is violating Section 403(a) of the Act and Sections 221.3(a), 221.38(a), and 221.53 of the Board's Regulations by failing to file with the Board a tariff specifically describing its tour operations as services offered in connection with air transportation. Finally, Foremost alleges that Qantas is violating Section 404(a) of the Act by failing to establish, observe, and enforce just and reasonable charges and just and reasonable classifications, rules, regulations, and practices relating to foreign air transportation.

All of these charges are premised on our acceptance of the characterization of Qantas' tour operator activities as air transportation services. Foremost has not supplied sufficient evidence to demonstrate to the Bureau of Enforcement that there are reasonable grounds to believe that this is so, and thus that these provisions of the Act and Regulations have been violated. Therefore, no enforcement proceeding will be instituted with respect to these allegations.

EFFECT OF THIS LETTER, AND REVIEW PROCEDURES

In accordance with Section 1002(a) of the Act and Rule 205(b) of the Board's Rules of Practice (14 C.F.R. Part 302), this letter advising you that no enforcement proceeding will be instituted with respect to the above-described parts of Foremost's Third-party Complaint in Docket 27631 will be deemed to be an order of the Board dismissing those parts of that Third-party Complaint, unless review

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of this ruling is requested by Foremost or is initiated by the Board.

Rule 205(c) of the Board's Rules of Practice (14 C.F.R. Part 302) provides that within 20 days after service of this letter refusing to institute an enforcement proceeding with respect to any part of Foremost's Third-party Complaint, Foremost may file a motion with the Board to review such action. The proceedings on such a motion, if it is filed, will be in accordance with 14 C.F.R. 302.18. Upon conclusion of such proceedings, if initiated, the Board will enter an order either dismissing these parts of Foremost's Third-party Complaint or directing such other action as it deems appropriate. If Foremost does not appeal, the Board may review the action described in this letter on its own initiative, within 15 days after the expiration date for appeal by Foremost.

Copies of this letter have been sent to Qantas and to the Board, and are available to the public.

Sincerely yours,

/s/ THOMAS F. McBRIDE
Thomas F. McBride
Director
Bureau of Enforcement

Affidavit of Service

I, Michael J. Holland, being over the age of 18 years, an associate attorney employed by the firm of Condon & Forsyth, hereby certify that I have on this 12th day of March, 1976, served three copies of the foregoing Appendix to the Petition for a Writ of Certiorari upon Respondent Foremost International Tours, Inc. by mailing copies thereof to its attorneys of record in sealed envelopes, with air mail postage prepaid, deposited in The United States General Post Office, located at 33rd Street and 8th Avenue, New York, New York 10001, and addressed as follows:

Alexander Anolik, Esq.
693 Sutter Street
San Francisco, California 94109

Melvin Shinn
Suite 223, 33 S. King Street
Honolulu, Hawaii 96813

/s/ MICHAEL J. HOLLAND
Michael J. Holland

Sworn to before me this
12th day of March, 1976

/s/ *Lawrence Mentz*
Notary Public

Lawrence Mentz
Notary Public, State of New York
No. 31-4513579
Qualified in New York County